UNCTAD

Commercial Diplomacy Programme

Distr.
GENERAL

UNCTAD/DITC/TNCD/6
7 February 2001

ENGLISH
Original: SPANISH

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Negotiations in WTO on the rules of the General Agreement on Trade in Services: the case of Venezuela

David Vivas Eugui

GE.01-50973 (E)

CONTENTS

		Page
I.	Objectives	3
II.	Introduction	3
III.	Negotiations on emergency safeguards in services	5
IV.	Negotiations on subsidies in services	20
V.	Negotiations on government procurement in services	28
VI.	Conclusions and policy options	37
Bibliography		46

Annex

ASEAN non-paper: draft agreement on emergency safeguard measures for trade in services 48

Negotiations in WTO on the rules of the General Agreement on Trade in Services: the case of Venezuela

David Vivas Eugui[1]

I. OBJECTIVES

The overall objective of this study is to clarify the current status of the negotiations in the World Trade Organization (WTO) on the rules of the General Agreement on Trade in Services (GATS) and to give some practical guidance on the subject. Many developing countries approach these negotiations with hope and trepidation regarding their possible impact on the GATS architecture in general and on the delicate balance between members' present rights and obligations. With this in mind, the following specific objectives have been set:

(a) To study the importance of the negotiations on GATS rules;

(b) To identify the negotiating scenarios;

(c) To analyse the main concepts involved in negotiating each of the GATS rules;

(d) To put forward proposals for strengthening the negotiating capacity of Venezuela and the developing countries in general;

(e) To make recommendations on putting these proposals into practice;

(f) To study Venezuela's specific situation and needs.

II. INTRODUCTION

The Uruguay Round negotiations covered not only the traditional subjects of trade in goods and market access, taken from the General Agreement on Tariffs and Trade (GATT 1947), but also trade in services and intellectual property. The negotiations culminated in a set of rules, including the Agreement Establishing the World Trade Organization, and in the adoption of the Uruguay Round agreements, with the GATS prominent among them. The GATS establishes for the first time multilateral rules, disciplines and commitments on trade in services[2] and defines trade in services in four basic modes of supply. These are:

- **Mode 1**. Supply from the territory of one member to the territory of another member. This is quite close to the traditional definition of the "export" of services;

- **Mode 2**. Supply in the territory of a member to a consumer from any other member. This mode of supply is known as "consumption abroad";

- **Mode 3**. Supply by a service provider of a member in the territory of another member by means of a "commercial presence". This mode of provision may be associated with foreign direct investment, depending on the particular circumstances;

– **Mode 4**. Supply by a service provider of a member through the presence of individuals in the territory of another member. This mode is associated with the cross-border movement of professionals and workers.

These modes of supply affect and underlie all commitments entered into under the GATS and the application of the rules and disciplines contained in it.

At present, the GATS contains, in its regulatory part, three mandates for negotiations on disciplines and rules applicable to trade in services, in the areas of safeguards, subsidies and government procurement. GATS "rules" refer to the broad set of regulations applicable under the multilateral system of trade in goods. The GATS rules are part of the "built-in agenda" agreed upon in the Uruguay Round and have been the subject of much debate within WTO, although the discussions have as yet produced no concrete results.

During the Uruguay Round negotiations, some questions related to the GATS rules and disciplines were not resolved and so the drafters established three specific negotiating mandates to be implemented after the agreement entered into force. The mandates are as follows:

Mandate for establishing emergency safeguard measures.[3] It is stipulated that multilateral negotiations are to be held on the question of emergency safeguard measures in services. This mandate is of great importance to the developing countries, which in principle have some reservations and fears about the rapid opening up of their markets for services or the effects that such opening up might have on their domestic markets. Several aspects of the mandate on emergency safeguards should be highlighted, including: (i) there is no definition of what constitutes a safeguard in the area of services; (ii) safeguards in services should be based on the most-favoured-nation (MFN) principle; (iii) the mandate calls for members to negotiate, not just to study; and, lastly, (iv) a deadline of three years is set for the outcome of the negotiations to be put into effect. This deadline has been renewed three times in three consecutive years.

Mandate on subsidies.[4] With regard to subsidies, the GATS begins by recognizing the distortive effects they have and stipulates that negotiations must be held with a view to developing disciplines to avoid such trade-distortive effects. In addition, the appropriateness of establishing procedures for implementing countervailing measures is to be considered; such procedures have existed for decades in the case of goods. The developed countries, for their part, are to take into account the needs of the developing countries by showing flexibility. The negotiations should be accompanied by the exchange of information on the subsidies provided.

Mandate on government procurement.[5] In the area of government procurement, the GATS contains an exception to the effect that commitments on MFN treatment, market access and national treatment shall not apply to the domestic regulations that govern government procurement of services. However, this rule is an improvement on article III, paragraph 8, of GATT 1947, which excludes government procurement from the scope of the latter agreement.[6] On the other hand, article XIII of the GATS establishes a clear mandate, to take effect at a future date, for multilateral negotiations on government procurement of services. This rule does not define either the scope or the area of application of the term "government procurement".

These three negotiating mandates have been under study since 1995 within the Working Party on GATS Rules. Discussions are now at a very advanced stage and are expected to yield results shortly on emergency safeguards in services. The negotiations on GATS rules have been given a new impetus as a result of the opening of the general negotiations on progressive liberalization provided for in article XIX of the GATS, which began in 2000. In other words, the review of the schedules of commitments in trade in services provided for in article XIX should go hand in hand with the negotiations on the GATS rules and indeed, in the view of some countries, the formulation of rules should be a precondition for the review or possible enlargement of schedules on access.

III. NEGOTIATIONS ON EMERGENCY SAFEGUARDS IN SERVICES

Emergency safeguards generally have a dual purpose. The first concerns the need to have a mechanism to forestall any increase in the supply of services that might cause or threaten to cause serious injury to the domestic service industry. The second concerns cyclical adjustments, or the possibility of obtaining a temporary suspension of obligations under a specific agreement in order to promote the development of a domestic supply sector or to increase competitiveness. This dual purpose should be borne in mind throughout the analysis of the various components of safeguards.

The main *benefits* that might accrue to developing countries from the establishment of regulatory safeguards in the GATS relate to:

- The need for a mechanism to give protection against unexpected situations or an increased supply of services from abroad;

- Consolidation and achievement of domestic policy goals in accordance with the provisions of article IV of the GATS;

- The need to strengthen and protect domestic capacity to provide services;

- Allowing domestic readjustments to counter the possible negative effects of liberalization programmes;

- Building confidence in domestic policy measures by implementing internationally recognized legal trade-protection mechanisms;

- The fact that this mechanism already exists in GATT 1947 and its proven usefulness in the field of goods.

The establishment of a safeguard mechanism does not only offer benefits; it also involves some *risks* for the developing countries, such as:

- If the rule establishes reciprocity and equal conditions for all parties to the GATS, the safeguard could also be used by developed countries to block exports of services from developing countries;

- The developed countries have a far more suitable institutional infrastructure and many years of experience not only with safeguards but also with similar investigative procedures in relation to anti-dumping, subsidies and countervailing measures;

- The experience of WTO members has shown that in trade in goods the developed countries are the main users of exceptions to the multilateral agreements in the form of safeguards;

- Developing countries face statistical constraints that restrict their ability to produce evidence of increases in imports and to determine, in an investigation into safeguards, the injury caused;

- The safeguard could be used very easily in supply mode 4, which is the one most used by the developing countries, but not in mode 3, which is the one mainly used by the developed countries.

The multilateral scenario proposed for the negotiations under article X of the GATS presents a clear dichotomy between, on the one hand, the main exporters of services - the Quad countries,[7] Switzerland and Hong Kong, China - and, on the other, the developing countries, led by ASEAN,[8] Argentina, India, Egypt, Pakistan, Peru and Venezuela. The main service-exporters do not wish to see any safeguard mechanism established that might restrict future access to the markets opened up in the GATS negotiations. With this in mind, they have said that there are two real limitations on the implementation of a safeguard in services. The first limitation concerns the lack of technical or statistical mechanisms for measuring the increase in supply, the injury and the causal link (this point is referred to as "non-feasibility"). The second consists of a lack of will on the part of many countries to adopt a mechanism of this sort (this point is referred to as "inappropriateness").

The developing countries would like to have a multilateral mechanism that allows them, given the little experience they have in the field of liberalization of services, to suspend, limit or modify commitments and to react to any unforeseen development that might affect, injure or jeopardize their domestic service-supply sector. These countries have been working since 1996 within the Working Party on GATS Rules to design and establish rules on safeguards in services. The most important codifying effort during the negotiations has come from a group of developing countries, in the form of a concept paper by ASEAN (see annex I), which presents in the form of a legal text a complete procedure for safeguards in services.[9]

Venezuela, for its part, belongs to the group of countries pushing for a safeguard mechanism. Its interests are based on the type of commitments it undertook in the Uruguay Round and on the need for a mechanism to suspend these commitments in an emergency.

Venezuela's commitments under the GATS and its interest in a safeguard in services

Within the framework of the general negotiations on services in the Uruguay Round, Venezuela took on a set of commitments in the various subjects listed in its schedule of specific commitments.[10] These commitments apply mostly to service-supply modes 2 and 3 as a way of consolidating foreign investment in certain sectors. The main sectors committed were the following:

(a) Business services (including computer and related services, economic consulting services, advertising and marketing, services incidental to mining, interpretation and translation);

(b) Communication services (including private courier services and cellular mobile telephone services);

(c) Construction and engineering services (engineering services in general and some services to the oil industry);

(d) Financial services (some banking services, insurance, reinsurance, capital markets and investment advisory services);

(e) Tourist services (hotel and restaurant services, travel agencies, etc.);

(f) Transport services (some maritime and maritime transport services, etc.).

More recently, specific negotiating rounds have been held in WTO on the financial services and telecommunications annexes to the GATS. As a result of these negotiations, Venezuela undertook commitments under the schedules on financial services[11] and telecommunications.[12] These commitments involved consolidating the opening up of the financial sector pursuant to the 1993 General Law on Banks and Other Financial Institutions[13] and consolidating the liberalization of basic telephone services and ending the monopoly of CANTV as of the second half of 2000.

As can be seen, Venezuela has high levels of commitments for a developing country. Given the little experience it has had in opening up its markets, unforeseen situations or emergencies might arise that justify the need for safeguard rules at the multilateral level. A safeguard mechanism would make it possible to temporarily suspend GATS commitments in the event of an increase in the supply of foreign services that might cause injury to domestic industry and, consequently, to provide some breathing space to set up programmes to promote competitiveness in a given service sector. At the same time, Venezuela has some experience in anti-dumping, subsidies and countervailing measures and safeguards in goods, as well as a large number of requests for investigations from local industry. This experience shows domestic industry making good use of the mechanisms available to it to challenge imports, fair or otherwise, when these cause injury to domestic industry.

Venezuela's concern has also been evident in its relationships within the Andean Group. The Andean Community has a framework set of rules[14] on services that contains some basic principles applicable to trade in services. However, there are no schedules of specific commitments but only special obligations applicable to land, sea or air transport liberalized as a result of independent decisions. Similarly, there are no specific regulatory safeguards applicable to the framework rules on services or agreements in the area of transport. As a result of the double threat of insecurity and possible injury to the domestic road-freight sector, Venezuela took unilateral measures on the basis of the existing safeguard in goods. These unilateral measures were declared illegal by the Court of Justice of the Cartagena Agreement, the highest dispute-settlement body of the Andean Community.

The discussions in WTO, which were initially very politicized, focused from 1998 onwards on specific aspects of a possible safeguard. They are basically aimed at analysing the various technical aspects of a safeguard, such as the following:

Definition and scope of a possible safeguard. The Working Party on GATS Rules has discussed the principles on which a safeguard in services would be based. It has been suggested that the basic principles for the safeguard of goods could be adapted for services. These principles require that there be an increase in the supply of services in any of the modes of supply, serious injury to domestic or national industry, as the case may be, and a clear causal link between the first and the second element. The countries of ASEAN[15] and India have pressed hard for the definition of safeguards to be based on the one relating to goods. They want to include not only the characteristic features of the Agreement on Safeguards, but also the alternative "unforeseen situation". The developed countries, for their part, claim not to understand what an unforeseen situation is in the context of services. Indonesia and India cited the example of the possible negative effects of technological change in the field of telecommunications.

Comments on "unforeseen developments"

The term "unforeseen developments" comes from the definition of a safeguard contained in article XIX of GATT 1947, on emergency action on imports of particular products. The term is not contained in the definition of safeguards in the Agreement on Safeguards. Unforeseen developments have been defined in a panel decision under GATT 1947 as follows:

"The term 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."[16]

Similarly, according to a note by the WTO secretariat on the history of the term "unforeseen developments",[17] in recent cases the WTO Appellate Body has affirmed that there is indeed a causal link between unforeseen developments and the contents of the ordinary requirements for a safeguard. However, the Appellate Body did not consider whether or not the increase in imports was caused by the unforeseen developments in any of the cases submitted.

In the negotiations on safeguards in services, some developing countries take the position that the term "unforeseen developments" should be included. Perhaps this is not the best option, since every analysis by the panels of the problem of unforeseen developments constitutes theoretically an extra requirement for the implementation of a safeguard, in addition to those already contained in the agreements on safeguards and countervailing measures. A better option might be simply to include the standards from the Agreement on Safeguards, suitably adapted to services, without linking them in any way to article XIX of GATT 1994 or adding new requirements that would make them much more difficult to apply. To comply with the requirements for evidence of increased supply and injury and the causal link between the two in a safeguard in services could prove quite a complex task for developing countries.

As for the possible scope of the safeguard, there are basically two models for safeguards that could be applied. In the first model, which can be found in the Agreement on Agriculture, the safeguard comes into effect when prices fluctuate and the volumes of agricultural products exported increase. In this case, the safeguard is not applied horizontally but only to those products that are subject to the application of the special agricultural safeguard. The other model corresponds to the safeguard for goods, which is applicable to any product from chapter XIV onwards of the harmonized tariff system. The reason for this dichotomy is that the agricultural safeguard model applies to a more limited range of products, which in turn means it is used less. Some developed countries would like to transfer the agricultural model to the GATS and thus apply the safeguard only to those service sectors that really need special protection. For the developing countries, the sectoral safeguard model could be problematic or might even have drawbacks. For example:

(a) Under which criteria would a sector or subsector be subjected to a sectoral safeguard?;

(b) The negotiating process would be very long and complicated because of the large number of sectors;

(c) What would happen in cases where members could not reach agreement on applying the safeguard to a sector or subsector?;

(d) It is unclear whether there would be a standard procedure for all the sectors listed (or included in schedules);

(e) In many cases the need for a safeguard is not predictable.

On the other hand, a horizontal safeguard would avert the need to negotiate and list the sectors that would be subject to the safeguard in services and would involve the use of far more straightforward standard investigation procedures.

Conditions for the use of a safeguard. Many WTO members believe that the best way to use a safeguard in services would be to apply the same conditions that apply to the use of a safeguard in goods, once they have been adapted for services. The following factors should be borne in mind in this respect:

(a) *Increase in supply or consumption of "like" or directly competitive services.* Services are not "imported", but supplied or consumed according to the four modes of supply of trade in services. "Supply" and "consumption" are two facets of the same service: for example, in mode 1 (cross-border services), services are supplied from country *x* and consumed in country *y*; in mode 2, services are supplied and consumed abroad; in mode 3, services are supplied and consumed in the host country; and in mode 4, as in mode 2, they are supplied and consumed abroad. According to the principles of safeguards in goods, any increase should be apparent in absolute or relative terms and thus the proof of the increase in supply must be based on demonstrable facts, not mere conjecture. These principles can be transferred to services without any problem whatsoever and they offer legal protection both to those taking the safeguard and to those affected by it. The only limitation concerns how it can be proved that there has been an absolute or relative increase, a point which will be studied in the part dealing with statistics on the increase in supply and serious injury.

The term "like service" has not been defined by members. In fact, some delegations think it is better not to define it, while others think the question should be left to the decisions of the Dispute Settlement Body, which will review any conflicts in the future. There is also a third way, consisting of listing the possible criteria; we list here the criteria normally used in goods and some that might be used in services.

Criteria most commonly used in goods	**Possible criteria for services**
1. Physical characteristics, properties and nature; 2. End use; 3. Tariff classification; 4. Consumer preference; 5. Elasticity of substitution and supply.	Objective elements: 1. Technical characteristics of the supply of the service; 2. Common end uses; 3. CPC[18] or W120[19] classification; 4. Consumer preference; 5. Elasticity of substitution and supply; 6. Conditions for services contained in contracts (standard or otherwise). Subjective elements: 1. The way the services are marketed and presented to the public (information, advertising); 2. The consumer needs that it is sought to satisfy.

(b) *Serious injury or threat of serious injury*. In cases of serious injury or threat of injury, the reasoning would be the same for goods and services. One of the objectives of the safeguard is to avoid or remedy imminent or actual injury so as to prevent a domestic service industry from disappearing as a result of a liberalization programme. Moreover, the injured parties are the same in services and goods - the companies or firms that make up the domestic production or services industry, as the case may be. The only exception is in mode 4, where the service providers are individuals. As in (a) above, proof of injury must be based on demonstrable facts, not mere conjecture. With regard to the definitions of serious injury and the threat of injury, the definitions in article 4 of the Agreement on Safeguards could be used.

(c) *Causal link*. This means that the injury must be attributable to an increase in supply or consumption. If there are reasons other than an increase in supply, the injury cannot be attributed to the increase in supply.

Emergency safeguards and mode 3 of supply. Various developed countries have said that in the case of mode 3 it is not possible to apply a safeguard measure since "foreign" suppliers already have a local presence[20] and so have acquired "rights" in that market. Similarly, they assert that a safeguard in mode 3 would lead to disinvestment and a lack of legal clarity about which rights are conferred by local presence. They therefore believe that any emergency safeguard should distinguish only between domestic and foreign industry.

ASEAN, for its part, puts forward in its concept paper (annex I, art. II, para. 4) three options for defining domestic industry and entitlements. The first two options are revised versions of those contained in its first draft,[21] while the third one is a new option linked to the application of entitlements in accordance with the schedules of commitments. The options are as follows:

Option 1: **Recognition of domestic industry (non-application of the safeguard measure in mode 3)**	**Option 2:** **Proactive application**	**Option 3:** **Proactive application limited to rights actually being exercised**
This option respects the rights of service suppliers operating in the territory of a member. This involves identifying nationals and suppliers with a commercial presence. Domestic industry could invoke the safeguard. At the same time, all the entitlements derived from a commercial presence are recognized. This option might be suitable for countries that wish to give legal guarantees for investment involving a commercial presence. The safeguard would apply to suppliers without a local presence.	In this case, the right to expand operations is not recognized as an entitlement of suppliers with a local presence. The safeguard is not applied only to suppliers without a local presence; quantitative restrictions may also be applied in a proactive way to suppliers with a local presence by not permitting future expansion.	Under this option, entitlements are limited to the application of the schedules of commitments of the member concerned and to the exercise by a supplier from another member of those entitlements before the application of the safeguard measure. This is a very attractive option for those countries that do not guarantee national treatment in their domestic legislation.

The majority of members agree that a local presence may indeed confer some "rights"; in other words, that those with such a presence have in some way become integrated into the host country's domestic industry. There are various interpretations of the actual nature of these rights. Some WTO members link these rights exclusively to each member's schedule of commitments under the GATS. From this viewpoint, the entitlements would depend on the content of a member's schedule of commitments and on a service supplier from another member actually making use of those commitments. This interpretation cannot be challenged since, under the GATS, national treatment obligations and market access are based exclusively on the schedules of specific commitments. Likewise, there must be a real local presence before a service supplier can demand to be considered at a given moment as a "domestic industry".

Other members link entitlements to domestic legislation or bilateral investment treaties (BITs), and thus believe that the rights should be determined on a case-by-case basis, not in a blanket fashion. This interpretation conflicts somewhat with the mandate in article X of the GATS, which clearly establishes that safeguards in services must be based on the MFN principle. This is because under many countries' domestic legislation or BITs, foreign service suppliers, once "established",[22] are entitled to national treatment and so cannot be considered as foreign. This in turn means, according to the argument put forward by the European Union, that the safeguards cannot be applied to suppliers who are already established as they are considered as nationals, and that there is discrimination between service suppliers who are established and those who are not, in that benefits are granted to some foreigners but not to others.[23]

The developing countries have reacted in two ways to this interpretation: on the one hand, the countries of Latin America consider that a local presence does entitle foreign suppliers to be treated as nationals under their domestic legislation and BITs while, on the other, some Asian countries which are not committed by domestic legislation or BITs consider that foreign service suppliers who are established should not be considered as nationals. These countries might be interested in using a safeguard to restrict the activities of suppliers with a local presence not only in the future but also perhaps retroactively, that is, by applying it to foreign service suppliers or companies established in their territories before the GATS came into existence.

The MFN principle and mode 3 of supply

Under the MFN principle, any benefit or advantage accorded to one member must be extended to all the other members. These benefits or advantages may be accorded by unilateral decision, by means of a specific act or by a legislative or bilateral act, or by means of a bilateral agreement. In the case of services, several myths surrounding mode 3 and the extension of advantages under the MFN principle need to be dispelled.

(a) Commercial presence does not necessarily equate with establishment for investment purposes. A company may have a local presence according to the definition contained in article XXVIII of the GATS but not meet the requirements or criteria established by domestic legislation or a bilateral agreement to be accorded national treatment. Establishment may involve registration or administrative procedures dealt with by certain authorities that go beyond a simple local presence.

(b) Even when commercial presence equates with establishment under domestic legislation and bilateral agreements and those advantages are extended to third countries as a result of MFN treatment, this does not mean that those advantages are bound[24] under the GATS. In other words, the law could be changed and the bilateral agreement denounced for the purposes of applying a safeguard or restricting market access.

(c) Even in cases where there are no commitments, under the MFN clause there must be no discrimination in favour of third parties. Any restriction must apply equally to all foreigners as the GATS MFN clause also applies to non-scheduled advantages or benefits.

Obviously, if domestic legislation or bilateral agreements identify commercial presence with establishment or include national treatment under pre-establishment, it will be impossible to apply the safeguard in mode 3 to the corresponding investment from a particular member. However, this statement in no way implies that it would be impossible to apply the safeguards to trade in services in mode 3. There are many developing countries where such legislation or agreements do not exist or are not comprehensive.

Finally, the imposition of a safeguard will always involve the risk of disinvestment. In this respect, it should be clearly understood that a safeguard is by nature an exception to specific commitments and its effect is always to benefit the domestic service sector in preference to the foreign one so as to allow a readjustment in competitiveness. The countries that wish to apply safeguard measures in mode 3 should understand that disinvestment or a possible negative impact on foreign investment is the obvious price to be paid for applying a safeguard in mode 3. The situation as far as goods are concerned is similar: if a safeguard is applied to prevent imports of a particular good, clearly the domestic price for that good will rise and competition will be affected.

In this context, it should be mentioned that safeguards are not the only mechanism available in an emergency. At the sectoral level, particularly in the case of the financial sector (which uses mostly mode 3 of supply), it is possible to take domestic measures for prudential reasons to protect investors and depositors and to ensure the integrity of the financial system.[25] In such situations, the GATS Annex on Financial Services permits the use of any measures provided that, where they do not conform with the provisions of the Agreement, they are not used as a means of avoiding the fulfilment of obligations.[26]

In the case of mode 3, while the developing countries may find themselves in a position where they need a safeguard mechanism, it will also be necessary to establish firm rules to promote free competition while protecting the domestic market against any abuses of dominant position that may arise in the supply of services at the domestic level.

In the particular case of Venezuela, the Investment Promotion and Protection Act[27] provides a definition of investment[28] that clearly covers all assets intended to generate income under any form of business or contract.[29] This definition in turn includes the GATS definition of "commercial presence" in relation to the constitution, acquisition or maintenance of a juridical person, a branch or a representative office for investment.[30] The Act also grants national treatment to foreign investors, with the exception of some specific areas such as radio, television and the Spanish-language press. This means that the supply of services under mode 3 automatically

receives national treatment. As a result, even if a safeguard mechanism for services was available in WTO, Venezuela would not be able to take discriminatory measures unless it changed its domestic legislation.

Statistics to prove that there is an increase in supply, injury and a causal link. Most of the developed countries, led by the Quad countries and Switzerland, believe there are no statistics available that would justify starting an investigation into safeguards. This argument has been countered by Venezuela, which submitted a paper on indicators showing the increase in consumption, injury and causal link.[31] This paper led to discussions among the developed countries and attracted the support of the developing countries.

With regard to the possible application of safeguards, the Venezuelan paper is seen as helping to identify precise indicators that would show any increase in supply or consumption and injury. These indicators were all presented together, with no differentiation between horizontal criteria (which apply to all sectors and modes) and sectoral criteria (which apply to specific sectors). The sources identified, some of which are public and some private, really exist and are now available in many countries. The indicators and criteria are as follows:

Indicators of an increase in supply[32]

1. Value added tax and tax statistics. Tax rates may differ between goods and services, and even among services (e.g. taxes on luxuries, hotels and tourism, etc.).

2. Corporate income tax (tax returns and tax statistics).

3. Taxes on financial transactions (tax returns and tax statistics).

4. Statistics provided by bank and insurance regulators (number of institutions, subscribed capital, market shares, etc.).

5. Statistics provided by professional associations (number of certifications of foreign professional qualifications) and immigration offices (number of foreign professionals by branch).

6. Price statistics for services in a particular market (public and/or private sources).

7. Analysis of the price structure (public and/or private sources).

8. Capital flows, foreign investments, profit repatriations, etc. (could be supplied by foreign investment offices).

9. Statistics on market shares (public and/or private sources, e.g. chambers of commerce).

10. Sectoral employment statistics (provided by sectoral associations or national labour offices).

11. Cross-border movements of persons, e.g. entry of foreigners, nationals travelling abroad, etc. (provided by immigration services and tourist offices).

12. Statistics from national or international transport regulators. Air, sea and land transport.

13. Balance-of-payments statistics.

Criteria for proving injury[33]

1. Losses declared.

2. Decline in consolidated offers.

3. Reduction in the total number of suppliers.

4. Decline in sales.

5. Reduction in productivity.

6. Decreasing employment capacity.

7. Reduced capacity utilization.

8. Reductions in price.

9. Fundamental changes in the pricing structure associated with losses or declining profits.

10. Fundamental changes in market shares.

11. Changes in the level of inventories.

12. Reduction in exports.

13. Decline in (relative) wages.

The main criticism of the Venezuelan paper is that the criteria for injury are far more precise than those for an increase in supply or consumption. This is a fair point, as it is easier to demonstrate that there has been injury in the national or domestic sector to companies supplying services, since the sources are the injured companies themselves or chambers or associations of enterprises in the sector concerned. In contrast, the statistics on the increase in supply or consumption of a service have to be drawn from a very diverse group of public or private organizations, depending on the mode or service sector concerned. So far, the Venezuelan paper has been the most reliable guide to possible sources of evidence. Some countries have added new criteria, and this has led to its greater acceptance by WTO members.

Comments on statistics for services

At the international level, there are few sources of statistics that are comprehensive, disaggregated or suitable for use as a basis for negotiations in the framework of the GATS. The main obstacles to collecting these statistics have been: (1) until recently there was no need to collect statistics on services; (2) little funding has been forthcoming for statistical collection; (3) there are no standard or internationally recognized technical criteria for collecting the statistics; (4) until the GATS entered into force there was no need to classify the supply of services by mode (it was usually done by sector). Nevertheless, as a result of the growth in services in the global economy, various international organizations such as OECD,[34] the IMF,[35] UNSD,[36] WTO and UNCTAD[37] backed the setting up of an inter-agency working group to design and prepare a manual on international trade statistics. The manual, which will be ready in 2001, seeks to meet the needs of both the collectors and the users of statistics on trade in services.[38] Apart from this compilation, there are no comprehensive worldwide statistical collections on trade in services.

Some sectoral studies by WTO and UNCTAD have shown that detailed statistics are available in sectors such as tourism, air transport and temporary movement of persons.[39] It has also been found that balance-of-payments statistics contain important economic indicators on the cross-border supply of services (mode 1).[40] This kind of source is becoming very important, as compiling the statistics is a mammoth task even at the national or sectoral level and it can take several years to build up a comprehensive picture. It is not just the statistical information that has to be taken into account, but also the findings of sectoral studies on the state of a particular sector at the national or international level and the impact of liberalization on that sector.

At the national level, information in a variety of forms is compiled and produced by Governments for their own needs. In recent years, however, the United States, the countries of the European Union, Canada and other developed countries have set about preparing methodologies for measuring overall trade in services and compiling accurate statistical data.[41] The methodologies used include compilations based on the CPC,[42] by sector, geographical area, mode of supply, etc. This kind of work is on the increase, with priority usually being given for the moment to the collection of information in areas of interest to the State concerned. A good deal of the input to these statistics comes from private sources or microstatistics;[43] the input from chambers of commerce and organized service associations deserves a special mention.

In the particular case of Venezuela, suitable statistics on specific service sectors can be found in the Yearbook of the Central Bureau of Statistics and Information. The sectors covered include telecommunications, tourism, banking and insurance, transport and leisure.

Provisional measures. ASEAN is the only group of countries to have mentioned the need for provisional safeguard measures. It does so in its concept paper, where it is proposed to establish provisional measures to remedy situations in which there is a threat of serious injury before any such injury materializes. ASEAN also lowers the standards of proof of the threat of injury by requiring only prima facie evidence. The ASEAN text on this point is based on the Agreement on Safeguards. The possibility of provisional action will be very important for the developing countries in situations where greater injury can only be avoided by taking measures quickly.

Procedural principles and time limits. There has been consensus in WTO that whatever the safeguard mechanism agreed upon, it should be based on an investigation. The investigation should respect the general principles of transparency and due process. There is also a need to include procedural elements such as requests by the affected or ex officio party, opportunities to submit claims, the administrative independence of the investigating authority, etc. All these general and procedural principles are very clearly set forth in the WTO agreements on safeguards and anti-dumping, and there is a large body of administrative writings and case law on these at both the national and multilateral levels. In the ASEAN concept paper, these procedural principles are completely adapted for services. As for the time limits, national investigations into safeguards and anti-dumping generally adopt a time limit of 12-18 months. This limit could also be suitable for investigations relating to safeguards in services.

Measures to be taken and their effectiveness. Some developed countries or regions, particularly the United States, Hong Kong (China) and Switzerland, have expressed doubts about which measures might be taken pursuant to any agreement on safeguards, given the intangible nature of services and the subsequent difficulties when border measures need to be established. They have also said that, even if measures were available, they would not be effective, as they would lead to disinvestment in the sector concerned. ASEAN answered the question of applicability very clearly, stating that the most appropriate form for safeguard measures would be the same as for the current limitations on commitments in members' schedules of commitments under the GATS. Thus, it said that the measures would take the form of the suspension, amendment or temporary withdrawal of the commitments undertaken in the schedules for market access and national treatment and the additional commitments annexed to the GATS. As for the argument about effectiveness, the countries of ASEAN have said that disinvestment would only affect mode 3 and that there would be no problem if the weighted market share of all those supplying the service when the safeguard measure was applied were to be maintained.

Comments on the measures to be taken and their effectiveness

The applicability and effectiveness of the measures should be analysed for each mode so as to avoid misunderstandings.

Mode 1. This would appear to be the most difficult to monitor because of the intangible nature of services. However, it should be pointed out that whereas the most effective and accurate way to monitor goods is through tariffs, the most suitable way to monitor services is through internal consumption taxes. Obviously, the former apply to border prices whereas the latter apply to the transaction price. Consumption tax is also the only one that can be disaggregated in various ways - for example, taxes on luxuries, conspicuous consumption, tourism, sports and leisure, etc.

Mode 2. This mode would appear to pose no problems after the presentation by the WTO secretariat of a paper on patterns in limitations scheduled under mode 2.[44] The paper lists the limitations in members' schedules of commitments under the GATS and presents them both horizontally and sectorally. Some examples of measures in this mode are: restrictions on transfers, payments or capital transactions abroad; discriminatory subsidies; discriminatory taxation; residence requirements and requirements relating to permission, notification, concessions and the acquisition of legal personality; limitations on the quantity of services that can be consumed abroad; limitations on buying insurance abroad; and limitations on the amount of foreign currency that can be taken abroad by tourists from a particular country.

With regard to effectiveness, it would seem that the restrictions in this mode are used normally[45] and monitoring is carried out internally before consumption of the service abroad.

Mode 3. Mode 3 is where there are the most problems with regard to the effectiveness of safeguard measures. Basically, the argument that they are ineffective stems from the fact that the application of safeguard measures to companies with a local presence could lead to disinvestment in the sector concerned and consequently cause injury to the State in which the investment is made. This is an economic argument and is only valid in those cases where the safeguard measure is intended to reduce current market share.

On the other hand, some developing countries have said that disinvestment might be avoided by using quotas based on historical market share in order to limit any increase in supply or in the number of foreign-run operations until some future date.

A counter-argument is that investment in expansion programmes is often affected when quotas are imposed on supply or operations. However, this counter-argument would apply only where schedules of commitments contained a commitment on the right to expand.

As can be seen, one could speculate endlessly on the effectiveness or lack of effectiveness of safeguard measures in mode 3 but it seems it will always be necessary to study each individual case to ascertain whether the application of a safeguard measure is economically feasible. The claim that disinvestment is automatic and that the entitlements conferred by a local presence are limited should not be accepted blindly. There is no single correct answer to the dilemma of effectiveness in mode 3 as everything depends on the type of safeguard measure to be applied and on the existing relationship in a given case between commercial presence and foreign investment under the GATS schedules of commitments, bilateral agreements or a member's domestic legislation on investment.

A safeguard measure in services in mode 3 will always involve some risk to locally established foreign industry. One possible solution would be to exclude domestic suppliers, as opposed to foreign suppliers not established locally, from the application of the safeguard measures. The applicable measures could take the form of limitations on access by new investors, limitations on the number of operations or representative offices, limitations on the type of activities that can be undertaken, discriminatory national treatment in the field of taxation, etc.

Mode 4. Mode 4 is a sword of Damocles for the developing countries, as it is the sector in which they would like safeguards to be applied to a lesser extent and at the same time the one for which it is easiest to collect statistics and evidence of supply or consumption in services, since the movement of people involves physically crossing borders and can therefore be monitored. This could mean that the developed countries would find it easier to take these emergency measures, and would do so more often. It is precisely these dilemmas that the developing countries must consider when the time comes to define their political or economic objectives. The measures applicable in this mode would basically be entry quotas for persons or discriminatory taxes linked to licences, recognition of qualifications, etc.

Special and differential treatment

The WTO secretariat prepared a paper on special and differential treatment in emergency safeguard measures which gives a very useful picture of the various forms of special and differential treatment as they now stand in the WTO agreements.[46] The secretariat distinguishes between "active" and "passive" SDT.[47] The former refers to the flexibility granted to developing-country members in meeting their obligations, while the latter refers to the rules intended to protect the interests of the developing countries. Examples of active SDT would be longer time limits for implementation and special rights or exceptions in the fulfilment of obligations. Examples of passive SDT would be technical assistance, the *de minimis* criterion, MFN exceptions, etc. The inclusion of SDT is fundamental for the developing countries at the present time. It should be seen not as a questionable right but rather as a necessary part of any multilateral trade agreement. The following are some examples of SDT that could be used in safeguards in services:

1. Broad *de minimis* margins;

2. Longer time limits for developing countries to investigate safeguards;

3. Deadlines for the implementation of definitive or provisional safeguard measures;

4. Possibility of renewing safeguard measures in cases where the causes of the injury still exist;

5. Non-application of safeguard measures to exports from the least developed countries;

6. Non-application of safeguard measures to services from developing countries under mode 4;

7. Technical cooperation in the training of staff from the national investigative authorities.

General recommendations for the developing countries in the negotiations on safeguards in services. The following are some of the recommendations that could be addressed to the developing countries in general:

- Introduce mechanisms allowing legal flexibility in the national rules establishing national treatment in services for the implementation of safeguard measures in services;

- Strengthen national investigative authorities;

- Collect national statistics that provide the appropriate evidence;

- Take advantage of special and differential treatment;

- Establish competition rules that complement the use of safeguard measures;

- Link the outcome of the negotiations on safeguards to the negotiations on market access under article XIX.

IV. NEGOTIATIONS ON SUBSIDIES IN SERVICES

Article XV of the GATS recognizes at the outset that subsidies "may" have trade-distortive effects. From the viewpoint of economic theory, this is actually quite a radical perception, as in theory any subsidy is considered as inherently distortive and consequently affects prices. These two observations bring into focus the problem of defining which subsidies may be considered distortive, and which not, in trade in services. So far, the practice in goods has been to define subsidies as "negative" or "positive" on the basis of trade-policy criteria.

On the other hand, subsidies do not have only negative or distortive effects. When a State has sufficient financial capacity, subsidies may be used to pursue national economic-policy objectives and help develop services. These objectives may include:

(a) Greater competitiveness;

(b) A more diversified domestic economy;

(c) Universal coverage of services;

(d) Support for loss-making public services;

(e) Minimizing the negative effects of structural adjustment programmes;

(f) Social, health and environmental targets;

(g) Support for small and medium-sized enterprises.

These horizontal objectives should be taken into account in the discussions and included in any agreement reached, so as to avoid setting up systems and mechanisms that might restrict developing countries' capacities to implement government policies that match their needs.

However, the main problem for developing countries with regard to subsidies is that they do not have sufficient financial resources to achieve the above-mentioned objectives. For this reason, some developing countries believe that there should be rules to limit the developed countries' aid programmes, especially those promoting the supply of services abroad.

The main proponents of the multilateral scenario in the area of subsidies and countervailing measures are the countries of the Southern Common Market (MERCOSUR) and Hong Kong, China, which would like the subsidies for agriculture- and transport-related services to be eliminated. On the other side of the negotiating table, there has been no clear opposition to the establishment of rules on subsidies in services; rather, there is a lack of interest and practical action on the part of almost all other WTO members.

Venezuela, for its part, has not made any substantive statements or submitted any specific documents on the matter.

Subsidies in services: the situation in Venezuela

Venezuela is a country in which the supply of services, both active and passive, is heavily subsidized. Its national budgets contain active subsidies for health, education, public transport, food for the population, research and development not directly related to production, etc. As can be seen, its active subsidies have a strong social and educational element. On the other hand, Venezuela offers passive incentives for investment in certain activities related to the supply of services. Incentives take the following forms:

(a) Income-tax exemptions. These apply to funding for concessions for public works;

(b) Reductions in the calculated value of new investments for income tax purposes.[48] The amounts of the reduction vary according to the activity. They apply to new investment in farming activities, tourism, construction, electricity generation, telecommunications, oil and gas production and related activities, and science and technology activities.

(c) Free trade zones. Venezuela's Free Trade Zones Act[49] provides for exemption from payment of tariffs, income taxes, value added tax and customs duties for industrial activities, the supply of related services and commercial activities carried out in the territory of the free trade zone. Although the activities involved in the supply of related and commercial services are not the primary target of the Free Trade Zones Act, the Act's scope is broad and substantial, including the following services: construction of facilities, site development, packing and packaging, marking, certification, staging events, marketing, experimentation, warehousing and storage, etc.

(d) Exchange of debt for investment. This is a scheme whereby investors acquire shares in national companies, which they pay for in bolívares obtained from the sale to the Venezuelan State of government debt bonds bought on secondary markets. The eligible activities are related to the following services: irrigation, environmental services, telecommunications, information technologies, biotechnology, tourism, research and development, government concessions, construction of medical and health facilities, construction of educational facilities, construction of social and community facilities, etc.

(e) Promotional measures and policy incentives for investment in Venezuela.[50] The Investment Promotion and Protection Act grants the national executive power to establish benefits or incentives for given industries or specific economic sectors considered as priorities. These incentives may only be granted to Venezuelan investors and may be made conditional upon specific action by the beneficiaries. The Act does not distinguish between goods and services.

(f) As can be seen, there are substantial subsidies, both active and passive. The active subsidies are more or less the same as those given by all Governments in the area of social welfare, but the passive subsidies are linked to many sectors which are subject to actual or potential GATS commitments and which are related to the actual supply of services. Thus care is called for and these subsidies must be taken into account in the negotiations on subsidies so as not to jeopardize their allocation. Almost all the developing countries are potential allies in achieving these objectives.

Venezuela is a country whose income from oil production has allowed it in recent decades to implement major subsidy programmes which are at risk of being open to countervailing measures from third countries if a multilateral mechanism is introduced for countervailing measures in services. On the other hand, Venezuelan exports are for the most part in goods, while its supplies of services abroad are still very modest. Similarly, associations of service suppliers are not yet well enough organized to be able to tell where foreign suppliers are granted subsidies that might affect their internal supply or exports.

At the moment the Andean Community has no rules on subsidies in services. This is because of the still limited legal framework and the superficial levels of specific commitments in the Andean rules on services. Nor have any steps been taken that might suggest that rules on subsidies in services might be introduced in the Andean Community.

Given this assessment, Venezuela does not appear to fit the profile of a country that might benefit from the establishment of rules on subsidies and countervailing measures.

General principles on subsidies in goods that are applicable to trade in services. The Agreement on Subsidies and Countervailing Measures begins by defining subsidies as "a financial contribution by a government or any public body within the territory of a Member" or "any form of income or price support".[51] It also lists the kind of practices that can lead to a subsidy.[52] On the other hand, the condition of specificity must also be met, whereby the subsidy is specific to a domestic enterprise or industry. Members decided to distinguish between the following three types of subsidy:

1. Prohibited subsidies, which are those contingent, *de jure* or de facto, upon export performance and those contingent upon the use of domestic over imported goods. These subsidies are actionable[53] before the WTO Dispute Settlement Body and are seen as the most trade-distortive;

2. Non-actionable subsidies, which are those intended for research and development activities, disadvantaged regions or environmental adaptation under special conditions. They are not actionable except in special circumstances.

3. Actionable subsidies, which are those that do not fit into either of the above categories. Compensation may be payable for them in cases where they cause injury to the domestic industry of another member and they are, of course, actionable before the Dispute Settlement Body. Obviously, they are also considered distortive when they lead to injury or the nullification or impairment of previously negotiated concessions.[54]

It can be clearly seen that members established a classification system that determines which subsidies are negative and under which conditions distortive effects can be produced. This classification system has been much criticized by the developing countries, as the non-actionable subsidies allow exceptions to be made for the support activities carried out primarily by the developed countries but not those carried out by the developing countries. The classic example is subsidies for research and development. As a result, many developing countries have proposed that the criteria on which this list is based should be reviewed in the WTO negotiations on implementation.

The Agreement on Subsidies and Countervailing Measures also establishes a procedural framework for the implementation of countervailing measures at the border. This procedure involves proving the existence of a specific subsidy and of injury to domestic industry and the causal link between the two.

Information collection and initial problems. The negotiations on subsidies have been much slower and far less specific than the negotiations on safeguards. This is because there has been no significant lobbying in favour of setting up a system of countervailing measures in services. The first thing the Working Party on GATS Rules did was to fulfil the mandate on exchanging information, by drafting a questionnaire with the help of the WTO secretariat.[55] The questionnaire put several basic questions to members to seek their views on the relationship between subsidies for services and article 1 of the Agreement on Subsidies and Countervailing Measures,[56] as well as various questions on domestic programmes in the area of subsidies for services. The questionnaire was not a great success, with only a few members replying to it, and it was very difficult to collect information.

When the discussions turned to finding solutions to the problem of the distortive effects of subsidies in services, members encountered some initial difficulties that are inherent in the nature of services.

Comments on the basic problems encountered by members in the negotiations on subsidies in services

The initial problems in the discussions on subsidies in services were as follows:

- Lack of statistical sources: the problem here is similar to that concerning safeguards as a result of the lack of macrostatistics. In this particular case it would be possible to use evidentiary criteria and indicators produced in the negotiations on safeguards in services, especially the indicators for determining injury.

- Classification: it may be that the budget appropriations do not match the CPC[57] or WTO[58] W120 classification criteria. This is in fact the case, although subsidies should always be included in the annual budget of a country, region or municipality so that they are always easy to identify. Once the subsidy has been identified, it needs to be compared with existing classification systems in services to see how closely it matches them. The results of this comparison can vary widely.

- Non-differentiation in budgets: sometimes the budget appropriations include several economic activities that do not differentiate between goods and services.

- Problems in measuring accurately the effect of the subsidy on the price: in goods, a good deal of experience has been built up calculating the effect of the subsidy on the price of the end product, but this is not the case in services, where experience is limited or non-existent.

- Inseparability of services: in marketing today, the sale of goods can be linked to services (as in the sale of cars with repair guarantees) and the sale of services to goods (as in the sale of telephone services that include a free telephone), and this can make it very difficult to calculate the effect of cross-subsidization.

These problems have not been resolved completely but the debate in the negotiations on safeguards in services might solve many of the questions raised.

Definition of subsidies in services. One useful comment made in the negotiations with regard to the development of new disciplines was the remark that it is feasible to apply to services many of the criteria contained in article 1 of the Agreement on Subsidies and Countervailing Measures. This is because the general principle that a subsidy exists where there is "a financial contribution by a government" or "any form of ... price support", as well as many of the situations covered by that principle (which normally applies to the production of goods), can be applied perfectly well to companies supplying services when such action is aimed at obtaining advantages in access to markets abroad or avoiding competition at home. Examples of such action include: direct transfer of funds, forgoing of government revenue, free provision of public services, facilities or advantages through funding mechanisms, insurance and transport, and price support, provided that they are granted to a company supplying services. Such a list could be very useful in the negotiations as we are primarily defining what constitutes a subsidy, regardless of whether it is for the production of goods or the supply of services. For the purposes of beginning to define a subsidy, what matters is whether there is an active (payment) or passive (foregoing revenue) financial contribution or price support in services.

As mentioned in connection with the Agreement on Subsidies and Countervailing Measures, subsidies must be specific before they can be considered to cause injury, that is, they must be granted to a "production" sector. In the case of services, this principle is far more important, since the very classification of services is based on sectors. One practical problem that might arise in determining the specificity of subsidies in services is that payments are not necessarily made in a way that corresponds to the sectors as classified. There may be situations where a subsidy affects one or more services or even affects goods and services together.

Relationship between subsidies and national treatment in services. The granting of subsidies under the GATS, unlike under GATT 1994,[59] is subject to the application of the general principles of this agreement and, more specifically, the principles of national treatment and market access. As a result, the subsidies can be listed as a particular commitment or included as part of a wider commitment in a member's schedules. This is very important in those schedules on market access or national treatment where "open-ended" commitments are established. In this case, the subsidies would be included in those commitments and it would therefore be impossible to discriminate in granting subsidies, as the same rights would have to be given to foreigners. This point should be borne in mind in order to avoid mistakes in interpreting the commitments in future negotiations.

Estimates of the distortive effect of subsidies in services. Another important question in the discussion has been how to determine which subsidies distort trade in services. Estimates for "activity" and "sectors" have been put forward. Some members have said that the possibility of limiting subsidies to exports, following the pattern in goods, should be explored. Other members have found this idea very difficult to accept, as services are supplied in the four modes mentioned earlier. In the classic view, there would only be "exports" in the strict sense of the word in mode 1. Nevertheless, services are traded and supplied in all four modes. So, a subsidy in one mode can affect supply in the other modes by giving some suppliers advantages over their competitors, especially when the subsidy is granted in the same sector.

Other countries have taken a sectoral rather than a modal approach, as in the case of the producers of agricultural products and related services and the suppliers of transport services who would like subsidies in services related to these areas to be eliminated.

Comments on drawing up a classification system for subsidies

As we have seen, the Agreement on Subsidies and Countervailing Measures uses a classification system that distinguishes between prohibited, actionable and non-actionable subsidies. It is interesting to note that the first criterion applicable to prohibited subsidies derives from economic theory, which suggests that the largest trade-distortive effects are linked to export and production activities. In contrast, the criterion applicable to non-actionable subsidies is an eminently political and sectoral one, comprising exceptions to suit the sensitivities of some members. As for the criteria used in the Agreement on Subsidies and Countervailing Measures, the developing countries have claimed they were not allowed to include in the list of non-actionable subsidies the subsidies that were important to promote development and so they do not identify with the outcome of those negotiations. In order to avoid problems in the future, the developing countries should draw up their own list of non-actionable subsidies. The following could be among the subsidies considered as "positive" and non-distortive:

By mode:

Mode 3: there are many passive subsidies for investment (for example, non-collection of taxes), especially in tourist activities.

By sector:

- Welfare subsidies: education, health, anti-poverty programmes, etc.;
- Subsidies for service suppliers from ethnic minorities: in many countries, subsidies are used to monitor minorities or help them to advance;
- Subsidies for small and medium-sized enterprises supplying services;
- Disadvantaged and border areas;
- Free trade zones for services;
- Research and development activities.

This list is purely illustrative and shows that each country should establish its own priorities in the event that disciplines on subsidies in services are established in WTO. Likewise, special and differential treatment should be taken into account when schedules are drawn up in the negotiations.

Apart from the comments mentioned, no country has so far submitted any paper on the distortive effects of subsidies in services, so that the issue has been always dealt with in a superficial way.

Cross-subsidization. The issue of cross-subsidization is very complex and it is the effects of subsidies on any of the following relationships that are under discussion in the Working Party:

Subsidy in a service → effect on a good

Subsidy in a good → effect on the supply of a service

Although these relationships are much more difficult to determine, some examples of how such relationships might arise have been produced in the Working Party.

Example 1: subsidies for export banking operations could affect the cost of credit for the export of goods.

Example 2: subsidies for the construction of aeroplanes or tankers could affect prices for cargo services by air or sea.

These examples are still very speculative and there is a lack of information on how such cross-subsidization would affect the price to the end consumer. It is difficult to make much progress in the talks when it is not clear how a mechanism could be applied to the initial relationship (subsidy for a service → effect on a service).

Remedies for subsidies in services and some procedural aspects. The Agreement on Subsidies and Countervailing Measures makes three types of action available to members in the case of imports of products benefiting from subsidies that are prohibited or actionable under the terms of the Agreement. These actions are: (a) initiate a dispute settlement procedure; (b) initiate an investigation into the subsidies with the aim of taking countervailing measures if need be; and (c) if the subsidy is legal, the non-violation remedy could be used, depending on the particular case.[60]

In the case of services, the same actions can be taken but limitations arising from the very nature of the above-mentioned services and methodological limitations in the investigative procedure need to be taken into account. Here are some ideas that might make it easier to plan an investigative procedure and take countervailing measures:

Comments on the methodology for applying a mechanism of countervailing measures in services

Determining the injury: the same criteria as those put forward in the draft safeguards in services could be used.[61]

Calculating the effect of the subsidy on the supply of services: there are widespread doubts about which methodology to follow. In goods, the methodology varies according to the type of subsidy (for exports, for production) and the form it takes (direct payments, funding, debt cancellation, delivery of goods and services, price support, etc.). In the case of services the problem is far more complex because of the problems of cross-modal effects (e.g., subsidies in mode 1 affect mode 3 and vice versa), non-differentiation of services, the imprecise classification

of services, etc. This presents us with a technical7 and economic measurement problem that is a real constraint on the actual use of procedures of this type. The countries interested in calculating these effects will need to carry out an economic analysis based on case studies in order to develop suitable methodologies in this area.

Calculation of countervailing measures: in goods, the comparison between the amount of the subsidy and the unit price of the good concerned is used. In services, it would be possible to work with abstract units for the supply of services (units established in an ad hoc fashion in each sector, which could be based on work units, the average price of the service or the type of transaction, as the case may be). However, this kind of solution is arbitrary and would be very difficult to apply. In addition, the same limitations would apply as in the previous point, including non-differentiation of services, differences in the way abstract units are defined and problems in classifying the services.

Imposition of border measures: it would not be possible to apply the same mechanisms as in goods, such as countervailing duties in the form of tariffs. Here, the use of taxes on consumption or on the supply of the service, which follow the commercial transaction rather than the good or service, is recommended. Tracking the transaction is far more appropriate for intangibles. This even applies to electronic commerce, where payment is made by credit card, giro payment or direct debit, which are often subject to financial or tax controls and so are easier to track.

Special and differential treatment. If progress is made in the negotiations on rules for countervailing measures, experience from the negotiations on the Agreement on Subsidies and Countervailing Measures and in consolidating special and differential treatment will be useful. Given this, the following points should be included in special and differential treatment:

- Permission for subsidies in mode 1 when research and development activities are concerned and permission for the developing countries to maintain free trade zones in services;

- Exemption from countervailing measures for developing countries with a low gross domestic product (GDP) and for the least developed countries;

- Higher *de minimis* margins;

- Permission to maintain subsidies on exports of services to developing countries for longer periods, subject to their gradual removal;

- If a classification for subsidies similar to that in the Agreement on Subsidies and Countervailing Measures is established, it should be applied with due moderation to subsidies aimed at developing countries' domestic services (those not intended for export), with schemes similar to the existing peace clause in the area of agriculture.

Recommendations for the negotiations on subsidies. Some recommendations for the developing countries in general might include:

- Seek recognition for the development aims of subsidies in services;
- Take stock of which subsidies in services most affect developing countries' supply of services;
- Draw up a list of the prohibited, actionable and "green" subsidies appropriate to developing countries' needs and objectives;
- Request national authorities to investigate the subsidies and countervailing measures that they would propose in the area of goods and to study technical methods for measuring the effects of subsidies in services;
- Identify the areas of national policy that should be protected in negotiations on subsidies and countervailing measures in services.

Latest progress by the Working Party on GATS Rules in the area of subsidies

In July 2000, the WTO secretariat submitted a document identifying, on the basis of information from the WTO trade policy reviews, the sectors where subsidies were most commonly granted and the mechanisms that tended to be used to subsidize services.[62] The sectors in which subsidies were most often encountered include tourism, transport, banking and finance, information technology and audiovisual services. The most commonly used subsidy mechanisms were direct grants, preferential credit, tax incentives and free trade zones. This paper has clarified for members the kind of measures that might distort trade and the sectors in which such measures are concentrated.

The last point to be made in this connection concerns the submission by the Chairman of the Working Party on GATS Rules of a list of questions, with input from a paper by Argentina and Hong Kong, China,[63] and proposals by various members, to give a greater focus to the discussions on subsidies in services. These questions are: definition, distortive effects, the application of GATS disciplines, the MFN clause, the role of subsidies in the developing countries, modal application, "like products", remedies, the aims of government polices, possible exceptions and the concept of nullification or impairment. It will only be possible to define future disciplines more precisely when reactions to this list are forthcoming.

V. NEGOTIATIONS ON GOVERNMENT PROCUREMENT IN SERVICES

The only WTO agreement to deal with government procurement in general is the plurilateral Agreement on Government Procurement. The Agreement applies only to the States that have signed it; so far, only a limited number of developed countries and one developing country are parties to it. This group of countries, in an effort to gain access to new markets in government procurement for their suppliers, pressed during the Uruguay Round to have included in the GATS a mandate to negotiate disciplines in the area of government procurement in services.

The main proponents of the mandate to negotiate on government procurement contained in article XIII of the GATS are the countries of the European Union, the United States and Japan. These countries seek greater transparency, liberalization of the market for government procurement and the gradual elimination of national preferences. The developing countries, for their part, tend to view this process with a good deal of mistrust, since government procurement is used in most of these countries as an instrument to promote sectors or specific activities that they are trying to develop or sustain. They have thus used government procurement as a means to promote industry, the supply of domestic services, support for small and medium-sized enterprises, cooperation with ethnic minorities or disadvantaged groups and the development of large corporations, and to boost innovation and technology transfer, etc. Consequently, negotiating on these promotional schemes is a very sensitive subject for many developing countries and even for some developed countries like New Zealand.

As has been mentioned, the main difference between this mandate and the one for safeguards and subsidies is that the latter concern actions to defend trade against "legitimate" imports, in the case of safeguards, and "unfair" imports, in the case of subsidies. In contrast, one of the objectives of the mandate on government procurement in services is market access. This implies that as from the year 2000 the negotiations on government procurement are subject to the principles of the negotiations on progressive liberalization pursuant to article XIX of the GATS, thereby underpinning the obligatory development objectives of the negotiations and permitting a process of differentiated liberalization that shows concern for the interests of the developing countries.

Government procurement: the situation in Venezuela

In the area of government procurement there are two relevant national laws. The first is the Tenders Act,[64] which regulates the procedures for acquiring goods, services and public works, with the exception of professional services and financial services. The Act contains stringent rules on transparency[65] and many of its articles are based on models of transparency from bilateral[66] or multilateral[67] agreements. The Tenders Act also includes, in its measures to promote economic development, an aspect that deserves careful consideration in the negotiations on the GATS rules.[68] These measures give the Venezuelan national executive some room for manoeuvre, allowing it to establish qualifying criteria for bids, on a temporary basis, in order to promote national development. The qualifying criteria could consist of national content requirements, the inclusion of national elements, technology licences, investment, countertrade and such like.[69]

The special features of the Tenders Act described here should be taken fully into account in the negotiations on the GATS rules, as it is the view of several developed-country members of WTO that these negotiations are basically about market access in government procurement of services. Venezuelan companies have only had access to government procurement contracts in a few neighbouring countries and the Caribbean in sectors related to engineering, architecture and consultancy services in general. It would appear that Venezuela could not be classed at the moment as an applicant for access to the markets for government procurement; rather, it would be interested in the following aspects of the GATS negotiations:

(a) The inclusion of features that favour transparency in government procurement;

(b) The protection of schemes promoting the development of domestic service-supply sectors;

(c) Backing for the recognition of special and differential treatment.

Definition and scope of application. In the negotiations on government procurement in services, the most active proponent of a future agreement on the subject has been the European Union, which submitted an unofficial paper in 1998 in which it proposed a methodology for working out a broad definition of government procurement with a view to a future agreement.[70] The methodology proposed is based on three criteria, namely, the nature of the transaction, the nature of the purchasing body and the nature of the service being acquired, as explained below.

(1) *What kind of transactions*? With regard to this criterion, the European Union refers to article XIII of the GATS, stating that there should be negotiations on "procurement … of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale". The European Union also considers that every type of contract should be included - including procurement, rental and leasing contracts and build-operate-transfer (BOT) contracts.

Procurement for governmental purposes

Article III, paragraph 8 (a), of GATT 1994 differentiates between "the procurement by governmental agencies of products purchased for governmental purposes" and procurement "with a view to commercial resale" (*"la adquisición, por organismos gubernamentales, de productos comprados para cubrir las necesidades de los poderes públicos y ... [la adquisición] para su reventa comercial"*). The first type of procurement has no commercial objective as the products are consumed by the State in the course of its normal activities. This type of government procurement is exempt from the application of the principle of national treatment. The second type of procurement, by contrast, is subject to national treatment and is governed by the principles of State trading enterprises (art. XVII).

Article XIII, paragraph 1, of the GATS echoes article III, paragraph 8, of GATT 1994, talking of "the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale" (*"la contratación por organismos gubernamentales de servicios destinados a fines oficiales y no a la reventa comercial o a su utilización en el suministro de servicios para la venta comercial"*). Nevertheless, some members have drawn attention to the reasons for the linguistic changes. The members of the Working Party on GATS Rules therefore requested the WTO secretariat to produce a note on the interpretations of article III of GATT and the applicability of article XIII.[71] The WTO secretariat provided several clarifications of how these articles had been interpreted, as follows:

(a) The two provisions not only fulfil a similar function in excluding government procurement from the application of certain disciplines from the agreements,[72] but are also formulated in almost identical terms;[73]

(b) Doubts were raised in a working party on accession[74] and in a panel[75] on the interpretation of article III. In both cases, a clear distinction was made between acquisitions for the Government's own consumption and acquisitions for commercial activities;

(c) In the same panel,[76] the term "government procurement" was interpreted broadly as including purchases, leasing, rentals, options to buy, etc.;

(d) In the negotiations on the Havana Charter, it was mentioned that article III of GATT 1947 had been drafted specifically to cover purchases of products for governmental purposes and not for commercial resale, although they could later be sold.[77]

It would therefore appear that the expression *"la contratación ... destinados a fines oficiales"* ("procurement ... for governmental purposes") (GATS, art. XIII, para. 1) means much the same as *"la adquisición ... para cubrir las necesidades de los poderes públicos"* (also translated as "procurement ... for governmental purposes") (GATT, art. III, para. 8 (a)), as opposed to operations for commercial purposes.

With regard to the type of transaction covered, many countries' domestic legislation tends not to exclude many types of transaction from the scope of the definition of government procurement. Most countries tend to include the purchase of services for official or governmental consumption, making no distinction between transactions. Some members of the Working Party consider that concessions should be included in the type of transaction covered by a future agreement on government procurement in services. This concept has been very difficult to define as there is no universally accepted definition of what constitutes a concession. In many countries with a civil-law system, and especially in Latin America, the concessions regime tends to be regulated by laws other than those on government procurement and thus they are outside the scope of the latter. This criterion is of a formal rather than substantial nature.

Under the concessions regime, a private body is granted public powers so that it can provide a service or carry out a construction project on behalf of the State. This kind of regime is much used in three particular areas, namely:

- Basic public services: telecommunications, water, refuse collection, ports, airports, radio, television, electricity, gas, etc.;

- Public works: construction of communication routes, services infrastructure, etc.;

- Exploitation, administration and management of non-renewable natural resources: concessions are frequently used as a way of granting mining rights in most Latin American countries.

In countries with a common-law system, the concept of concessions is not understood as the granting of public powers, but as a contract under which the private party undertakes the risk of operating a service in exchange for remuneration.[78] Such contracts are subject to the same criteria and principles as competitive bidding.

Possible interpretations of the term "concessions" in the GATS, and the situation in Venezuela

Members can choose from three interpretations of, or possible approaches to, concessions as they relate to the GATS, depending on their objectives and interests:

(a) A concession is a government contract for the purchase of services. In this case, the concessions would be subject to the negotiations pursuant to article XIII, paragraph 2, of the GATS;

(b) A concession is a form of investment in services. In this case, the concessions would be subject to the general rules of the GATS. Also, if they were scheduled, they would be subject to the rules on MFN treatment, national treatment and market access;

(c) A concession is a service "supplied in the exercise of governmental authority" (GATS, art. I, para. 3 (b)) and therefore not subject to the GATS. This would apply if the concession consisted of a service that was not supplied in a commercial setting or that was supplied without competition from one or more suppliers.

In the particular case of Venezuela, the concessions on public works and services come under situation (b). However, when it is a question of granting the rights to exploit and administer natural resources over which the State has sovereign rights, the case described in (c) applies. For this reason, it would be better to avoid commitments on the concessions linked to the exploitation of natural resources in Venezuela.

2. *Who is the "purchasing body"?* What the European Union is proposing here is to determine which levels of government are covered by a possible definition. To be more precise, reference is made to: the national or federal level; the state, departmental or regional level; and the local or municipal level. The definition of levels is basically a political discussion. The developed countries, especially the United States, would prefer all levels to be covered. India and the countries of ASEAN, on the other hand, tend to make frequent use of the government procurement system to support their regions or culture or even to tackle problems related to ethnic minorities in their territories. Other countries, like some of the Latin American countries, are working on new decentralization policies that they do not want to risk or jeopardize. For the moment, there is no solution to this multiplicity of interests.

There has also been discussion on whether to include State trading enterprises in the definition of government procurement. This discussion has arisen because the GATS has no exact parallel with article XVII of GATT 1994, on State trading enterprises. Article XVII establishes that State enterprises or enterprises with special or exclusive rights should not discriminate in their imports or exports. This article applies only to goods. On the other hand, article VIII of the GATS contains a clause on monopolies and exclusive service suppliers that seeks to prevent any monopoly supplier from acting in a manner inconsistent with article II of the GATS and with a member's specific commitments. As can be seen, article XVII basically regulates the purchases of State trading enterprises by enforcing the principle of non-discrimination. In contrast, article VIII of the GATS is more like a regulation to curb abuses of dominant position in the area of competition than a rule on government procurement.

The countries seeking greater liberalization want State enterprises to be included in the definition of government procurement whereas the countries that still have a large sector of State trading enterprises have no interest in adopting this position, even though they have not brought up the issue in the Working Party on GATS Rules. Venezuela and Brazil are in the latter group of countries.

The situation in Venezuela

In the case of Venezuela, the Tenders Act[79] is applicable to government procurement by the states and municipalities. The preferences in the Act are horizontal and apply to the Republic as well as to the states and municipalities. Venezuela's decision on whether or not to include states and municipalities does not depend on technical factors, as the system is the same for all levels of government. The decision should be based on whether or not it is willing to grant market access at those levels.

With regard to State trading enterprises, Venezuela reported to the Working Party on State Trading Enterprises that Petróleos de Venezuela SA did not discriminate in its imports or exports. Nevertheless, Venezuela's current Tenders Act includes companies in which the State holds over 50 per cent of the share capital.[80] As has been mentioned, the Tenders Act contains the systems of preferences referred to above. These systems could at some time in the future, depending on the application of the new Tenders Act, lead to conflict with article XVII of GATT 1994.

3. *What is being purchased?* In the view of the European Union, all the service sectors contained in the classification list in document MTN.GNS/W/120 should be included.[81] Most developing countries believe it is too soon to know what kind of methodology should be used to establish which services are to be included or not, especially when the content of the obligations has not yet been determined.

Relationship with the work of the Working Group on Transparency in Government Procurement. As a result of the Singapore Ministerial Conference, a mandate was established to study transparency in government procurement, taking into account national practices, with the aim of identifying the elements to be included in a future agreement.[82] This work is being carried out by the Working Group on Transparency in Government Procurement. The Working Group has pursued its tasks independently and has included both goods and services in its discussions on transparency. As a result, the issue of transparency was not brought up in the Working Party on GATS Rules until the third WTO Ministerial Conference, in Seattle in 1999. The European Union subsequently claimed that whereas the mandate of the Working Group on Transparency was for a "study", the mandate on government procurement of services was for "negotiation", and that the discussions should cover not only market access but also transparency and due process.

What might be on the negotiating table. In 2000, the discussions in the Working Party on GATS Rules received a boost when the general negotiations on progressive liberalization envisaged in article XIX of the GATS got under way. As a result, the European Union, in the hope of obtaining benefits in the area of government procurement through possible thematic exchanges[83]

in the negotiations, again submitted a paper on other aspects of the negotiations. This time the European Union specifies which disciplines, in its view, should be analysed by the Working Party on GATS Rules, referring to the principle of non-discrimination (MFN, national treatment), appropriate review mechanisms, flexible rules for the developing countries and transparency.

The mandate in article XIII of the GATS

The mandate in article XIII of the GATS establishes the following:

"1. Articles II [on MFN treatment], XVI [on market access] and XVII [on national treatment] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

"2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement."

There are two theories as to how this article should be interpreted. According to the first, which is advocated by the developed countries, as a general principle the GATS articles on MFN treatment, national treatment and market access do not apply to government procurement of services for governmental purposes. However, this general principle would be subject to one important exception, in the form of the eventual outcome of the negotiations on multilateral disciplines in the area of government procurement of services, pursuant to article XIII of the GATS. This interpretation is not shared by all WTO members, especially by some developing countries.

According to the second interpretation, which is supported by those developing countries, the negotiations mentioned in paragraph 2 of article XIII should not deal with any of the subjects of the articles whose application is ruled out in paragraph 1. This argument has not yet been resolved and the same opposing positions are still held.

Reactions to the European Union paper were not slow in coming, with countries such as India, the countries of ASEAN and Brazil asserting that, in accordance with article XIII, government procurement of services should not cover MFN treatment, national treatment or specific commitments. At the same time, they believe that the issue of transparency should be studied in a horizontal fashion in the Working Group on Transparency. The United States, in response to these comments, then asked how those countries understood the mandate. The developing countries have undoubtedly been on the defensive over government procurement in services since, even though it is not overly difficult for some of them to reach agreements on MFN treatment or transparency, there are difficulties relating to the application of the principles of national treatment and market access.

The situation in Venezuela in relation to the principles of MFN treatment, national treatment and market access in government procurement of services: the situation of Venezuela

(a) In relation to MFN treatment and government procurement of services: Venezuela is a party to an international agreement containing rules on government procurement in general, the Free Trade Agreement between Venezuela, Colombia and Mexico (the G3), which has rules on both procedural matters and market access. The G3 meets the GATS criteria for agreements on economic integration[84] and so should not be subject to an MFN clause in any agreement on government procurement in services. At the moment, Venezuela has no bilateral agreement on government procurement that could be extended to other members by including an MFN clause.

(b) In relation to national treatment and market access: as has been mentioned in previous sections, Venezuela's Tenders Act[85] contains a package of economic development measures that permit the use on a temporary and exceptional basis of qualification criteria based on special preferences. These measures are to be implemented by decision of the Venezuelan executive. As yet, the form these development measures might take in practice has not been established. On the other hand, Venezuelan legislation establishes a horizontal margin for national preferences not greater than 5 per cent for bids made on an equal footing.

As can be seen, the Venezuelan negotiators should seek some way to transfer these development measures and national preferences to lists of exceptions or to have any existing commitments incorporated in positive lists so as to include only those aspects of interest to Venezuela. On this point, it is important to mention that even if a stage is reached at which commitments on national treatment or market access are under discussion, the GATS negotiating scheme is one of positive lists of commitments and that the negotiations on government procurement of services should follow the same scheme in order to avoid conflicts between commitments and to promote consistency.

Special and differential treatment. WTO members have made no mention of special and differential treatment because no conclusion has yet been reached on the level of commitments they wish to negotiate. Some options for special and differential treatment can be found in the plurilateral Agreement on Government Procurement (AGP). The AGP includes a comprehensive scheme for special and differential treatment designed to attract the developing and least developed countries to participate in it. The AGP provides that in the implementation and administration of the Agreement account will be taken of the development, trade and financial needs of the developing countries, particularly the least developed countries.[86] Among the needs listed in the AGP are: measures to safeguard their balance-of-payments position, the promotion of the establishment or development of domestic industries, support for industrial units that are highly dependent on government procurement and the promotion of regional agreements.[87] In accordance with the provisions of the AGP, these needs will be taken into account when drawing up the lists of commitments and agreed exclusions. Rules on technical assistance during procurement procedures are also provided for, as is cooperation in translating the qualification documentation and tenders for suppliers from developing countries.

In addition to the AGP options, the following options for special and differential treatment could be mentioned:

- Technical and financial cooperation in setting up national information centres;
- Progressive fulfilment of commitments entered into;
- Technical assistance for national bodies in setting up electronic government-procurement systems;
- Flexibility in the requirements for the submission of tenders by companies from developing countries, as regards format, deadlines, language, etc.;
- The possibility of including lists of the national preferences available to the developing countries in line with their particular needs.

Dispute settlement. On this point, as on the previous one, members have not made any proposals. By way of reference, it can be pointed out that both the AGP and the informal proposals put forward by some members on a possible agreement on transparency in the context of the Working Group on Transparency in Government Procurement include dispute-settlement clauses in accordance with articles XXII and XIII of GATT 1994 and the WTO understanding on the settlement of disputes. Given this, it is perfectly predictable that the countries interested in opening the markets for government procurement will try to have this kind of clause included in the outcome of the negotiations. The developing countries, for their part, have always refused to accept this kind of clause, particularly in negotiations where their ability to take advantage of agreements on market access, as in the case of government procurement, is minimal.

Recommendations concerning the negotiations on government procurement in services. The following are some of the recommendations that could be addressed to the developing countries:

- Seek recognition for the development objectives of government procurement in services;
- If the negotiations turn to market access, link the negotiating mandate in article XIII to the principles in articles XIX and IV;
- Avoid commitments on transparency that would involve an excessive administrative burden;
- Make full use of special and differential treatment;
- Identify the domestic sectors in which the developing countries have advantages in access to the markets for government procurement in the developed countries;
- Consider excluding concessions from the definition of government procurement.

VI. CONCLUSIONS AND POLICY OPTIONS

The negotiations on GATS rules should not be seen solely in the context of the Working Party on GATS Rules. It is very important not to lose sight of the vital importance of linking those negotiations with article XIX, on progressive liberalization, and article IV, on increasing participation of developing countries in trade in services. Generally speaking, the principles contained therein encompass all the negotiations under way on the WTO "built-in agenda", adding the objectives of further liberalization while taking into account the needs of national development policies.

The developing countries should carefully assess the benefits and risks that might result from the negotiations on each subject. The way in which the agreements are applied in practice can often produce paradoxical results, as in the case of safeguard measures in goods, where one of the countries that makes most use of the exception to compliance with the obligations in emergencies is a developed country. Similarly, the capacity to apply any rules domestically should be weighed carefully. The existence of a set of rules on countervailing measures in subsidies does not necessarily mean that the developing countries have the infrastructure, statistical sources or institutional capacity to carry out investigations that meet international requirements.

The case might also arise in which some developing country might benefit from the adoption of rules traditionally opposed by the developing countries in WTO, a case in point being transparency in government procurement, from which both domestic and foreign firms could benefit. With this reservation in mind, the following specific points can be made.

Emergency safeguards in services. A horizontal set of rules on emergency safeguards in services would give the developing countries a legitimate way to suspend or freeze their GATS commitments in the event of increases in supply or consumption by foreign suppliers, especially in the case of modes 1 and 2. It will be recalled that the developed countries are the main suppliers and exporters in these modes. Also, the existence of such a set of rules would give the negotiators dealing with commitments on market access more room to manoeuvre vis-à-vis their Governments back home. The other side of the coin is that it would be necessary to establish appropriate structures and build up reliable reference sources so as to be able to apply the safeguard. Another possible problem for many developing countries is that the emergency safeguard would also be applicable to, and would be more effective in, mode 4, a mode in which the developing countries are beginning to supply services.

During the negotiations, the developed countries will continue to insist that there are problems of feasibility or appropriateness until they spot an opportunity for a satisfactory trade-off. They not only wish the safeguard to be applied to mode 4 as a compensation, but also hope to get commitments on market access in the area of government procurement. Simply allowing safeguards to be applied in mode 4 would already be a major concession by the developing countries; it is not thought that obtaining rules on safeguards in exchange for rules on market access in government procurement would be a fair economic trade-off or one that favoured the developing countries.

The regulatory structure proposed by ASEAN in its concept paper (see annex I) is an excellent basis on which to conclude an agreement on safeguards to be annexed to the GATS. This concept paper successfully adapts the basic principles of safeguards in goods and satisfactorily incorporates the features specific to services. It is recommended that a legal study should be carried out to analyse the potential effects of the proposal.

In the particular case of Venezuela, there has been the political will to make available this kind of emergency measure in services, and similar measures have in fact been used within the Andean Community. Venezuela has an institutional body with several years' experience in dealing with anti-dumping, subsidies and safeguards.[88] Thanks to this body, a large number of first-class and administratively sound investigations and rulings have been made. The establishment of multilateral rules on safeguards in services would give Venezuelan service providers access to a legal remedy with which to confront the legitimate increase in the provision of services by foreigners and which would be predictable, internationally recognized and subject to the principles of transparency and due process. At the same time, Venezuela should be consistent in its approach and should promote the inclusion of this kind of mechanism in the negotiations not only in WTO but also in the Free Trade Area of the Americas (FTAA) and the Andean Community.

Subsidies in services. In principle, the establishment of a set of rules on subsidies and countervailing measures would benefit those countries which cannot afford to fund activities related to the supply of services. As can be deduced from the chapter on subsidies in services, the main activities for which State aid is provided in the developed countries are in the fields of research and development, audiovisual services, transport and finance. The developing countries, for their part, provide passive subsidies to attract foreign investment in areas of interest to them such as manufacturing, tourism, social activities, etc. The developing countries should draw up lists of the subsidies they consider "negative" or "positive" according to their interests, both by sector and by mode of supply. Then, if rules were established for subsidies and countervailing measures, they would not be designed yet again to suit the needs of other members.

The developing countries have built up some experience in the last few years in the area of investigations into subsidies in goods. This experience, when linked with policies for institution-building and, where possible, the collection of statistics on both the supply and the consumption of services in the areas of interest, could enable rules on subsidies and countervailing measures to be applied in services.

Venezuela, for its part, provides large active subsidies in health, education and nutrition that vary according to its financial capacity and yearly budget. In Venezuela, the subsidies are increased within the national budget when oil revenue rises and reduced when it falls. In addition, there are many passive subsidies in the area of investment which, even though they are not export-oriented, might be compensable if rules on subsidies and countervailing measures in services were to be implemented. As in the previous case, an accurate survey of the country's active and passive subsidies would be needed to avoid any erroneous perception. Given the structure of Venezuela's economy, where public spending plays a fundamental role in suppliers' economic growth and development, the establishment of disciplines in the area of subsidies and countervailing measures should be approached with a good deal of caution.

Government procurement. This appears to be the area in which the developing countries have the least interest in seeing multilateral disciplines established. This lack of interest is evident in the small size of the group of companies from developing countries with the capacity to supply the amounts needed and meet the requirements set by the Governments of the developed countries, and also in the important role of public spending in domestic policies on industrial and social development and on establishing service suppliers. Developing countries' capacity to obtain access to the markets for government procurement in services is still very limited and for the moment any agreement on the subject would not be translated into an increase in the supply of services to the developed countries. Acceptance of any commitment on government procurement in services within WTO should first identify possible trade-offs in areas of interest.

On the other hand, if the negotiations reach the point where commitments on market access are being analysed, the developing countries should clearly assert the objectives of article XIX, on progressive liberalization, and article IV, on increasing participation of developing countries. It will be necessary to identify the sectors of interest to the developing countries and to seek to have those interests included in the developed countries' schedules of commitments. They should also take advantage of "cross-list schemes" (i.e. seek bilateral concessions) to put pressure on the commercial partners they have historically dealt with, in order to consolidate markets.

The subject of concessions can be approached from various angles depending on each State's political viewpoint. Many countries have reservations about granting this kind of privilege to foreigners for reasons of national security or because they want to keep strategic service-management sectors in the hands of their own nationals, and thus do not wish to undertake international commitments in this area. Others, in contrast, consider concessions as a means of investment similar to privatization and wish to attract foreign capital to build and manage public services. The latter countries tend to be more flexible with regard to possible commitments. There is therefore no single concept or universal scheme for concessions. It will be up to each individual developing country to choose the route that best suits its political and economic programme.

Venezuela is a country that has shown a strong interest in international agreements on transparency in government procurement, in both goods and services. Its interest is based on the need to lay down principles that give legal protection to suppliers and that prevent corruption. However, Venezuelan legislation has left some leeway for domestic policy to determine national preferences and so has given the national executive quite a lot of room for manoeuvre in establishing economic development measures through special preferences. In the light of these considerations, it seems prudent not to undertake commitments that go beyond those to transparency or MFN treatment in the negotiations on GATS rules. However, if negotiations on market access become unavoidable, Venezuela should seek to open up hemispheric markets in energy, professional services and building services by taking advantage of the GATS "cross-list" negotiations.

In conclusion, it ought to be pointed out that any progress by the Working Party on GATS Rules will depend on the willingness of WTO members to link the outcomes of the negotiations on safeguards, subsidies and government procurement, and perhaps to link those outcomes to other subjects of the negotiations under article XIX of the GATS. Clearly, unless there is joint progress on the subjects of safeguards and government procurement in services, it will be impossible to achieve any concrete results in the negotiations. In the last few years, the developing countries

have learned to oppose the points they disagree with during negotiations unless other countries show a willingness to make progress on subjects that are important to the developing countries. In this context, the idea that trade liberalization should reflect the interests and needs of both the industrialized and the developing countries is becoming more firmly established.

Notes

[1] The author is currently a consultant with UNCTAD; LLB Universidad Católica Andrés Bello, Caracas, Venezuela; specialized in transnational negotiations at the Universidad Externado de Colombia; LLM Common Law Studies, Georgetown University, Washington, D.C., USA. The author wishes to thank Manuela Tortora, David Diaz, Cristina Hernandez, Ana Maria Alvarez and Natalia Guerra for their comments. Any errors are the author's alone.

[2] The agreement establishes that trade in services shall be governed by general disciplines, such as most-favoured-nation (MFN) treatment, transparency and national regulations, and the content of specific commitments (market access, national treatment and other commitments); it follows the model used in bilateral investment agreements, of market access via a "positive list" of the commitments mentioned. According to the "positive list" principle, commitments are only undertaken in those areas, elements or descriptions contained in the schedule of commitments annexed to a specific agreement. This model is commonly used in investment agreements that have a section on market access and that are not concerned solely with the protection and promotion of investment. This point should be borne in mind when considering the scope of GATS obligations.

[3] GATS, art. X. The WTO agreements can be found on the organization's Web site, at www.wto.org.

[4] GATS, art. XV.

[5] GATS, art. XIII.

[6] There have been two initial interpretations of this exception which have been very important in the discussions within the framework of the GATS. The first is that this rule was included to avoid any confusion over the scope of the commitments included by members in their schedules for government procurement transactions carried out by governmental agencies for governmental purposes. The second, put forward by several developing countries, claims, in addition to the above, that MFN, market access and national treatment commitments cannot be applied to the negotiations on government procurement.

[7] A group of countries consisting of Canada, Japan, the United States and the countries of the European Union.

[8] Association of South-East Asian Nations.

[9] See WTO document S/WPGR/W/30, of 14 March 2000. The latest update of the paper is from 31 October 1999.

[10] See WTO document GATS/SC/92.

[11] See WTO document GATS/SC/92/Suppl.1 and 3.

[12] See WTO document GATS/SC/92/Suppl.2 and 2/Rev.1.

[13] *Official Gazette*, No. 4,641, 2 November 1993.

[14] See the general framework of principles and rules for liberalizing the trade in services of the Andean Community (Andean Community Decision No. 439 of 11 June 1998).

[15] In its concept paper, ASEAN does not include the term "unforeseen circumstances" but talks of an "emergency" (see note 9).

[16] See the "Report of the Intersessional Working Party on the complaint of Czechoslovakia concerning the withdrawal by the United States of a concession under the terms of article XIX", GATT/CCP/106 (27 March 1951), adopted on 22 October 1951 (GATT/CP.6/SR.19).

[17] See WTO document Job 5077 of the Working Party on GATS Rules, dated 18 August 2000.

[18] United Nations Central Product Classification.

[19] WTO Sectoral Classification List (MTN.GNS/W/120, of 10 July 1991).

[20] A local presence can take many forms: branches, subsidiaries, representatives' offices, service-distribution offices, etc.

[21] See note 9.

[22] This may or may not include a local presence.

[23] With respect to this argument, it is seen as inconsistent to consider a service supplier as a national by virtue of its local presence for the purpose of extending the application of a possible safeguard in services under the GATS, while on the other hand considering it as foreign for the purpose of applying the MFN principle under the same GATS. It is not thought possible for a single supplier to have a double legal personality for the purposes of one international agreement.

[24] "Bound" refers to binding commitments in the GATS schedules that can only be modified or renegotiated in accordance with the procedures established in that agreement.

[25] See art. 2 (a) of the GATS Annex on Financial Services.

[26] Ibid.

[27] *Official Gazette*, No. 5,390, 22 October 1999.

[28] Investment Promotion and Protection Act, art. 3.1.

[29] Ibid.

[30] Art. XXVIII of the GATS.

[31] See WTO document Job 5294/Rev.1, of 2 November 1999.

[32] Ibid.

[33] Ibid.

[34] Organization for Economic Cooperation and Development.

[35] International Monetary Fund.

[36] United Nations Statistics Division.

[37] United Nations Conference on Trade and Development. All UNCTAD documents can be found on its Web site at www.unctad.org.

[38] See United Nations Statistics Division, "International review of the manual on statistics of international trade in services", 3 October 2000.

[39] See UNCTAD, "Assessment of trade in services of developing countries: summary of findings" (UNCTAD/DITC/TSB/7), 28 August 1999.

[40] Ibid.

[41] See the papers on the experience of the United States, the European Union, Canada, and Trinidad and Tobago in compiling statistics, presented at the WTO seminar on statistics for trade in services, held at WTO headquarters in Geneva on 3 October 2000.

[42] United Nations Central Product Classification.

[43] Statistics from a particular sector or subsector.

[44] See WTO document S/WPGR/W/33, of 31 May 2000.

[45] Ibid. The document points out that there are 312 limitations on the commitments in WTO members' schedules under mode 2.

[46] See WTO document Job 5539, of 15 September 2000. See also Mina Mashayekhi, "GATS 2000: progressive liberalization", in UNCTAD, *Positive Agenda and Future Trade Negotiations*, Geneva, 2000, which takes a look at the proposals submitted at the third WTO Ministerial Conference, in Seattle. See also, in the same publication, Murray Gibbs, "Background paper on special and differential treatment in the context of globalization", and UNCTAD, Commercial Diplomacy Programme, *Training Tools for Multilateral Trade Negotiations: Special and Differential Treatment*, Geneva, September 2000.

[47] Special and differential treatment.

[48] Income Tax Act, art. 57, *Official Gazette*, No. 5,390, 22 October 1999.

[49] *Official Gazette*, No. 34,772, 8 August 1991.

[50] Investment Promotion and Protection Act, *Official Gazette*, No. 5,390, 22 October 1999.

[51] Agreement on Subsidies and Countervailing Measures, art. 1.

[52] Ibid.

[53] That is, they are subject to countervailing national measures and may be referred to the WTO Dispute Settlement Body.

[54] Nullification or impairment does not imply a violation of the WTO agreements but loss or injury caused by a lawful measure that affects a member's trade prospects.

[55] See WTO document S/WPGR/W/16, of 5 February 1997.

[56] This article lists the kinds of actions considered as subsidies in goods.

[57] See note 42.

[58] WTO Sectoral Classification List (MTN.GNS/W/120, of 10 July 1991).

[59] Art. III, para. 8 (b), of GATT establishes that national treatment provisions "shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products". There is no such rule in the GATS to exclude the granting of subsidies from the MFN clause.

[60] The non-violation remedy is contained in art. XXIII of GATT 1994. It consists of referring a matter to the Dispute Settlement Body for nullification or impairment.

[61] See note 31.

[62] WTO document S/WPGR/W/25/Add.1/Corr.1*, of 11 July 2000.

[63] WTO document S/WPGR/W/31, of 16 March 2000.

[64] Decree-law (Tenders Act), *Official Gazette,* Special Issue No. 5,386, 11 October 1999.

[65] Ibid., arts. 9 and 34.

[66] Bilateral agreement proposed by the United States to the Andean Community in 1999.

[67] Proposal by the Republic of Korea, Hungary and the United States in the Working Group on Transparency in Government Procurement.

[68] Tenders Act (see note 64), arts. 36–43.

[69] Ibid., art. 37.

[70] Unofficial European Union paper of 13 February 1998.

[71] Document S/WPGR/W/29, of 31 March 1999.

[72] Art. III excludes the application of national treatment in goods and art. XIII excludes the application of the MFN, national treatment and market access principles.

[73] S/WPGR/W/29, para. 4.

[74] Accession of Venezuela, Report of the Working Party, L/6696, adopted on 11 July 1990. The case referred to imports by the State for its own consumption and imports by normal commercial enterprises. There is also an interpretation here of art. XVII of GATT 1947.

[75] GPR.DS1/R, of 23 April 1992 (not adopted).

[76] Ibid.

[77] *GATT Analytical Index: Guide to GATT Law and Practice,* WTO, 1994, p. 214.

[78] See the opinion expressed by the representative of New Zealand in document S/WPGR/M/23, of 6 July 1999.

[79] Art. 2 (see note 64).

[80] Ibid.

[81] This document contains a list classifying the service sectors covered by the GATS.

[82] See the 1996 Singapore Ministerial Declaration.

[83] Better known as "trade-offs", these consist of making joint progress on two negotiating mandates in sectors with differing interests. An example of this would be allowing progress on safeguards in exchange for progress on government procurement.

[84] Art. V of the GATS.

[85] Arts. 36-43 (see note 64).

[86] See AGP, art. V.

[87] Ibid.

[88] Commission on Anti-Dumping and Subsidies.

Bibliography

Consejo Nacional de Inversión Extranjera de Venezuela (CONAPRI). Régimen Legal Regime de Inversión Extranjera. Caracas, 2000.

Decisión Andina 349, del 11 de julio de 1998.

Decreto-ley (ley de licitaciones). Gaceta Oficial de la República de Venezuela N° 5386 Extraordinario del 11 de octubre de 1999.

Ley de Impuesto sobre la Renta de Venezuela. Gaceta Oficial N° 5,390 del 22 de octubre de 1999.

Ley General de Bancos y demás Instituciones Financieras de Venezuela, Gaceta Oficial N° 4641 del 2 de noviembre de 1993.

Ley de Promoción y Protección de Inversiones. Gaceta Oficial de la República de Venezuela N° 5.390 del 22 de octubre de 1999.

Ley de zonas francas de Venezuela. Gaceta Oficial N° 34.772 del 8 de agosto de 1991.

GATT Document. Adhesion of Venezuela, document L/6696.

GATT Document. GATT/CP.6/SR.19. 22 October 1951.

GATT Document. GPR.DS1/R.

United Nations. Intemational review of the manual on statistics of intemational trade in services. United Nations Division on Statistics, 2000.

United Nations Conference on Trade and Development. Assessment of trade in services of developing countries: summary of findings. Document UNCTAD/ITCD/TSB/7. Geneva, 1999.

United Nations Conference on Trade and Development. Positive agenda and füture trade negotiations. United Nations, New York and Geneva, 2000.

WTO Ministerial Declaration of Singapore. 1996.

WTO Document. Job 5077.

WTO Document. Job 5539.

WTO Document. Job 5294/Rev.l.

WTO Document. GATS/SC/92.

WTO Document. GATS/SC/92 suppl.1 y 3.

WTO Document. GATS/SC/92 suppl.2 y 2revl.

WTO Document. Job 5077.

WTO Document. MTN.GNS/W/120.

WTO Document. S/WPGR/W16.

WTO Document. S/WPGR/M/23.

WTO Document. S/WPGR/W25/Add.l/Corr.l*.

WTO Document. S/WPGR/W/29.

WTO Document. S/WPGR/W/30.

WTO Document. S/WPGR/W/31.

WTO Document. S/WPGR/W/33.

WTO Document.

WTO Secretariat. Analytical Index rules and norms of the GATT. World Trade Organization. Geneva, 1994.

WTO Secretariat. Guide to the Uruguay Round Agreements. World Trade Organization. Geneva, 1999.

ANNEX

DRAFT AGREEMENT ON EMERGENCY SAFEGUARD MEASURES FOR TRADE IN SERVICES

The Members of the World Trade Organization, hereinafter referred to as the "Members",

Having regard to paragraphs 1 and 5 of article X of the Marrakech Agreement Establishing the World Trade Organization;

Bearing in mind the objectives of the General Agreement on Trade in Services (the GATS);

Desiring to clarify, implement, and reinforce the object and purpose of the GATS, in particular that reflected in its Preamble and article X, by developing rules on emergency safeguard measures for trade in services;

Recognizing that Members may need to have reasonable recourse to temporary measures in response to emergencies resulting from its specific commitments under the GATS; and

Reaffirming the need to allow structural adjustment of the domestic service industry of Members, in particular that of developing countries, with a view to enhancing competition in the area of services, and facilitating the development of the service industry of developing countries which are essential to their national economic development programmes;

Hereby agree as follows:

ARTICLE I

General provisions

1. A Member may, by applying emergency safeguard measures in accordance with the provisions of this Agreement, temporarily withdraw or modify its specific commitments undertaken under Part III of the GATS, in order to temporarily safeguard its domestic industry against serious injury or threat thereof.

2. For the purpose of this Agreement:

(a) "Domestic industry" means, for the purpose of determining serious injury or threat thereof,

"Suppliers as a whole of the like or directly competitive services who are natural persons or juridical persons of the Member intending to apply an emergency safeguard measure[a] [and are operating within the territory of that Member], or those whose collective output of the like or directly competitive services constitutes a major proportion of the total domestic supply of those services".

(b) "Serious injury" means a significant overall impairment in the position of a domestic industry that is determined in accordance with article III of this Agreement.

(c) "Threat of serious injury" means serious injury that is determined to be clearly imminent, in accordance with article III of this Agreement.

(d) "Supplier of another Member" means supplier of "service of another Member" as defined in article XXVIII (f) of the GATS.

3. Definitions provided under article I and article XXVIII of the GATS shall be applicable to this Agreement.

ARTICLE II

Conditions of application

1. An emergency safeguard measure may be applied to trade in services only if the applying Member has determined, in accordance with the provisions of this Agreement, that, as a result of the effect of its specific commitments undertaken under Part III of the GATS, there is an emergency where there is an increase in supply of the service concerned by a supplier or suppliers of another Member, [or consumption thereof,] either in absolute terms or relative to domestic supply [or consumption of such domestically supplied service], which is causing or is threatening to cause serious injury to the domestic industry that supplies like or directly competitive services.

2. An emergency safeguard measure shall be applied only where serious injury or threat thereof has been determined pursuant to an investigation in accordance with article III of this Agreement.

3. An emergency safeguard measure shall be applied to a service irrespective of its source and mode of supply.

4. Option 1

An emergency safeguard measure shall not be applied in a manner that [affects] [diminishes] rights vested upon a service supplier of another Member through the establishment of its commercial presence within the territory of the Member intending to apply an emergency safeguard measure prior to the date of application of the emergency safeguard.

Option 2

An emergency safeguard measure shall not be applied in a manner that [affects] [diminishes] rights vested upon a service supplier of another Member through the establishment of its commercial presence within the territory of the Member intending to apply an emergency safeguard measure prior to the date of application of the emergency safeguard measure. Such rights shall not include those pertaining to expansion activities of the service supplier of another Member concerned, such as establishment of additional branches or subsidiaries; acquisition, merger, or consolidation with any other service supplier, whether foreign or national; supply of additional capacity of the relevant service to the domestic market; infusion of additional capital; or acquisition of additional equities.

Option 3

An emergency safeguard measure shall not be applied in a manner that [affects] [diminishes] the entitlements of any service supplier of another Member in supplying the service concerned through commercial presence within the territory of the Member intending to apply an emergency safeguard measure at the moment of application of the emergency safeguard measure. The entitlements referred to in this paragraph is confined to entitlements conferred in the implementation of a Member's Schedule of Specific Commitments and which have been exercised by the service supplier of another Member prior to the date of application of the emergency safeguard measure.

5. An emergency safeguard measure may be applied only to trade in services, the transaction of which is concluded between the supplier and the consumer after the date of entry into force of the emergency safeguard measure.

ARTICLE III

Determination of serious injury and threat thereof

1. The determination of serious injury or threat thereof shall be carried out pursuant to an investigation to be initiated and conducted by the competent authorities of the Member intending to apply an emergency safeguard measure, upon a written request by a domestic industry.

2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

3. An investigation initiated and conducted pursuant to this article shall be concluded within [12] [18] months. The provisions of article 3 of the Agreement on Safeguards annexed to the Marrakech Agreement Establishing the World Trade Organization shall apply *mutatis mutandis* to such investigation.

4. In the investigation to determine whether a serious injury or threat thereof is being caused to a domestic industry under the terms of this Agreement, the competent authorities shall

(a) determine that there is an increase in the supply of the service concerned by a supplier or suppliers of another Member, [or the consumption thereof,] by evaluating, in particular, the rate and the amount of the increase in absolute or relative terms, and the share of the domestic market taken by the increased supply [or consumption] of such service. In doing so, the competent authorities shall examine all relevant indicators and sources of information relating to the volume of supply [or consumption] of such service, such as.[b]

(i) tax-related information concerning service supply [or consumption] in the sector or sub-sector concerned, including information on value added taxes, income taxes, and taxes on financial transactions, where applicable;

(ii) statistics provided by regulatory authorities in the sector or sub-sector concerned;

(iii) statistics provided by professional associations concerned;

(iv) statistics provided by immigration authorities;

(v) price statistics in the sector or sub-sector concerned;

(vi) price structure of the service suppliers in the sector or sub-sector concerned;

(vii) statistics on foreign investments in the sector or sub-sector concerned, such as capital flows or profit repatriations;

(viii) statistics on market shares in the sector or sub-sector concerned;

(ix) statistics on employment in the sector or sub-sector concerned;

(x) statistics on cross-border movement of persons.

(b) determine that there is a serious injury or threat thereof by evaluating all relevant criteria of an objective and quantifiable nature having a bearing on the situation of the domestic industry concerned, such as[c]

(i) decline in profits, return on investments or cash flow;

(ii) occurrence of losses;

(iii) price reductions;

(iv) fundamental changes in the price structure associated with losses or declining profits;

(v) decline in consolidated offers;

(vi) reduction in the number of domestic suppliers or establishments;

(vii) decline in the growth of output or sales;

(viii) fundamental changes in market shares;

(ix) decreasing employment;

(x) reduction in productivity;

(xi) decline in relative wages;

(xii) reduced ability to raise capital or investment;

(xiii) reduced level of capacity utilization;

(xiv) reduction in exports;

(xv) changes in the level of inventories.

(c) determine, on the basis of objective evidence, that there is the existence of a causal link between increased supply [or consumption] of the service concerned and serious injury or threat thereof. In doing so, the competent authorities shall evaluate, on the basis of relevant injury criteria, the effects or impact of such increased supply [or consumption] on the domestic industry concerned. The competent authorities shall also examine any known factors other than such increased supply [or consumption] which are causing serious injury to the domestic industry at the same time. When known factors other than increased supply [or consumption] of the service concerned are causing serious injury to the domestic industry at the same time, such injury shall not be attributed to increased supply [or consumption] of such service.

5. The factual basis of the investigations conducted pursuant to this article shall cover a period of time that is equal to or longer than 12 months.

ARTICLE IV

Applicable measures

1. Where serious injury or threat thereof has been determined pursuant to an investigation referred to in article III of this Agreement, the Member concerned may, with regard to trade in services, apply safeguard measures only to the extent necessary to prevent or remedy serious injury or threat thereof and to facilitate adjustment of the domestic industry concerned. Members should choose measures most suitable for the achievement of these objectives.

2. The applicable measures shall include any or a combination of the following:

(a) temporary withdrawal or modification of specific commitments undertaken pursuant to article XVI of the GATS;

(b) temporary withdrawal or modification of specific commitments undertaken pursuant to article XVII of the GATS;

(c) temporary withdrawal or modification of additional commitments undertaken under article XVIII of the GATS.

[3. If a quantitative restriction is used as emergency safeguard measure, such a measure shall not reduce the volume of supply of the service concerned by suppliers as a whole of another Member, [or consumption thereof,] below the level of a recent period which shall be the average of the volumes of such supply [or consumption] in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury or threat thereof.]

ARTICLE V

Compensation and suspension of specific commitments

1. A Member intending to apply the emergency safeguard measure shall endeavour to maintain a substantially equivalent level of specific commitments to that existing under the GATS between it and the Members of which service suppliers would be affected by such a measure.

2. To achieve this objective, the Members concerned may agree on adequate means of compensation relating to trade in services for the adverse effects of the measure on their trade in services. If no agreement is reached within 30 days after the start of consultations, the Member of which service suppliers are affected shall be free, not later than 90 days after the measure is applied, to suspend, upon expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Services, the application to the Member applying the emergency safeguard measure of substantially equivalent level of specific commitments under the GATS, the suspension of which the Council for Trade in Services does not disapprove.

3. For the purpose of compensation or suspension of specific commitments referred to in paragraph 2 of this article, the Members concerned may determine that a level of specific commitments is substantially equivalent to that existing under the GATS only on the basis of all relevant factors of objective and quantifiable nature. For general guidance, they may refer to the illustrative, non-exhaustive lists of indicators, criteria, and sources of information provided under paragraph 4 (a) and (b) of article III of this Agreement.

4. The right of suspension referred to in paragraph 2 of this article shall not be exercised for the first two years that an emergency safeguard measure is in effect, provided that the emergency safeguard measure has been taken as a result of an absolute increase in supply [or consumption] of a service and that such emergency safeguard measure conforms to the provisions of this Agreement.

5. The provisions of this article shall not apply in the case of a provisional safeguard measure.

ARTICLE VI

Duration

1. A Member shall apply an emergency safeguard measure only for such period of time as may be necessary to prevent or remedy serious injury or threat thereof and to facilitate adjustment of the domestic industry concerned. The initial application period of an emergency safeguard measure shall not exceed three years, subject to the provisions of article IX, unless it is extended under paragraph 2 of this article.

2. The initial application period of an emergency safeguard measure may be extended only after a new investigation, made pursuant to a written request by the domestic industry concerned, determines that the emergency safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence, based on objective criteria, that the domestic industry concerned is adjusting. The total period of application of an emergency safeguard measure including the period of application of any provisional measure, the initial application period and any extension thereof, shall not exceed five years, subject to the provisions of article IX.

3. In order to facilitate adjustment in a situation where the expected duration of an emergency safeguard measure is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds two years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized. In case of withdrawal, liberalization, or extension of measure, the Members concerned shall review and, where appropriate, adjust any compensation or suspension of commitments measure in accordance with article V of this Agreement, with a view to achieving the objective stated in paragraph 1 of article V of this Agreement.

4. No emergency safeguard measure shall be applied again to trade in services that has been subject to such a measure, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

ARTICLE VII

Provisional measures

1. A provisional safeguard measure may be applied by a Member in critical circumstances where delay would cause damage which would be difficult to repair.

2. A provisional safeguard measure may be applied only for a non-renewable period not exceeding [12] [18] months, and only if

(a) an investigation has been initiated in accordance with the provision of article III; and

(b) a preliminary affirmative determination has been made of an increase in the supply of a service by a supplier or suppliers of another Member, [or the consumption thereof,] that has caused or is threatening to cause serious injury to a domestic industry; and

(c) the competent authorities referred to in article III of this Agreement judge a provisional measure necessary to prevent serious injury being caused during the investigation.

3. In the case that a provisional measure takes the form of a special duty on the supply of service by a supplier or suppliers of another Member, the duty shall be promptly refunded if the investigation referred to in article III does not determine that increased supply [or consumption] of such service supplied by a supplier or suppliers of another Member has caused or threatened to cause serious injury to a domestic industry.

4. The duration of a provisional measure shall be counted as a part of the initial application period referred to in paragraph 1 of article VI of this Agreement.

5. Article V and paragraph 1 of article VIII of this Agreement shall not apply to provisional safeguard measures taken under this article.

6. Paragraphs 3, 4, and 5 of article II of this Agreement shall apply to provisional safeguard measures.

ARTICLE VIII

Consultation, transparency, and notification

1. A Member intending to apply or extend an emergency safeguard measure shall provide adequate opportunity for prior consultations with those Members of which service suppliers have a substantial interest in the matter, with a view to, inter alia, reviewing the information notified under paragraph 4 of this article, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of article V of this Agreement.

2. Each Member shall publish promptly and, except in critical circumstances, at the latest by the time of their entry into force or their effective date, all relevant laws, regulations and administrative measures and procedures relating to the application of an emergency safeguard measure, including the results of an investigation.

3. Each Member shall respond promptly to all requests by any other Member for specific information on any of their laws, regulations and administrative measures and procedures relating to the application of an emergency safeguard measure.

4. A Member shall immediately notify the Council for Trade in Services upon:

(a) initiating an investigation;

(b) making a finding of serious injury or threat thereof;

(c) taking a decision to apply a provisional emergency safeguard measure;

(d) taking a decision to apply or extend an emergency safeguard measure;

(e) reviewing the situation pursuant to paragraph 3 of article VI of the Agreement.

A Member shall also immediately notify the results of consultations, reviews, as well as of compensation and proposed suspension of commitments to the Council for Trade in Services.

5. Members shall notify promptly the Council for Trade in Services of their laws, regulations and administrative measures and procedures relating to emergency safeguard measures as well as any modification made to them.

ARTICLE IX

Developing countries

1. An emergency safeguard measure, or a provisional safeguard measure, shall not be applied against the supply of a service by a supplier or suppliers of a developing country Member, [or the consumption thereof,] if that Member's share of the total supply of the service concerned in the territory of, or to service consumers of, the Member intending to apply the measure does not exceed [10] per cent, provided that developing country Members with less than [10] per cent share of supply collectively account for not more than [30] per cent of such total supply.

[2. An emergency safeguard measure, or a provisional safeguard measure, shall not be applied against the supply of a service by a supplier or suppliers of a developing country Member, [or the consumption thereof,] if the service concerned is supplied through presence of natural persons of that Member in the territory of the Member intending to apply the safeguard measure and that Member's share of the total supply of the service concerned through presence of natural persons of another Member in the territory of the Member intending to apply the safeguard measure does not exceed [20] per cent. This paragraph shall not apply if developing

country Members with less than [20] per cent share of supply collectively account for more than [50] per cent of total supply of the service concerned through presence of natural persons of another Member in the territory of the Member intending to apply the safeguard measure.]

3. A developing country Member shall have the right to apply an emergency safeguard measure for an initial application period of up to five years. If the measure is extended pursuant to paragraph 2 of article VI of this Agreement, the total period of application of the measure including the period of application of any provisional measure, the initial application period and any extension thereof, shall not exceed [7] [8] years.

[4. Option 1

The period of two years referred to in paragraph 4 of article V of this Agreement, during which the right of suspension under paragraph 2 of the same article shall not be exercised, shall be extended to five years, if the Member applying the emergency safeguard measure is a developing country Member.

Option 2

A developing country Member shall be exempt from obligations referred to in paragraphs 1, 2 and 3 of article V of this Agreement.]

ARTICLE X

Surveillance

1. The Council for Trade in Services shall have the following surveillance functions with regard to emergency safeguard measures:

(a) to monitor the general implementation of this Agreement and make recommendations towards its improvement;

(b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement has been complied with in connection with an emergency safeguard measure;

(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

(d) to review, at the request of the Member intending to apply a safeguard measure, whether proposals to suspend specific commitments pursuant to article V of this Agreement is "substantially equivalent";

(e) to receive and review all notifications provided for in this Agreement;

(f) to perform any other function connected with this Agreement that it may determine.

2. To assist the Council in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

ARTICLE XI

Dispute settlement

The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to disputes arising under this Agreement.

ARTICLE XII

Review

This Agreement shall be reviewed by the Council for Trade in Services eight years after its entry into force. The review shall be completed within two years.

ARTICLE XIII

Entry into force

This Agreement shall be an annex to the GATS and an integral part thereof. It shall enter into force in accordance with the provisions of article X:5 of the Marrakech Agreement Establishing the World Trade Organization.

Notes

[a] "Natural person of the Member intending to apply an emergency safeguard measure" means a natural person who resides in the territory of the Member intending to apply an emergency safeguard measure and who under the law of that Member is a national of that Member, or has the right of permanent residence in that Member in accordance with article XXVIII (k) of the GATS. "Juridical person of the Member intending to apply an emergency safeguard measure" means a juridical person which is owned or controlled by persons of that Member in accordance with article XXVIII (n) of the GATS and this article.

[b] This list is of an illustrative nature and is provided for guidance only. It is not exhaustive, nor can one or several of these indicators and sources of information necessarily give decisive guidance. To determine that there is an increase in the supply [or consumption] of the service concerned, it is unnecessary to examine all these indicators and sources of information.

[c] This list is of an illustrative nature and is provided for guidance only. It is not exhaustive, nor can one or several of these indicators and sources of information necessarily give decisive guidance. To determine that there is a serious injury or threat thereof, it is unnecessary to examine all these criteria.

- - - - -